

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1996, C. 113

- by -

Terrance Brule
("Brule")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	MARK THOMPSON
FILE NO.:	97/218
DATE OF HEARING:	July 21, 1997
DATE OF DECISION:	August 5, 1997

DECISION

APPEARANCES

M. Grant Gayman, Esq.	for BC Furnace Service Ltd.
Bayne L. Vardy	for BC Furnace Service Ltd.
Terrance Brule	for himself

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) first by Terrance Brule (“Brule”) of a Determination issued by the Delegate of the Director of Employment Standards on March 12, 1997. After Brule filed his appeal, his former employer, BC Furnace Service Ltd. (the “Employer”), filed its own appeal. The Determination found that Brule was a manager under the terms of the Act during his period of employment with the Employer and thus was not entitled to payment for overtime hours worked or work on a statutory holiday. The Determination further found that Brule had been compensated properly for vacation pay, but was entitled to compensation for length of service. Furthermore, the Determination found that money had been improperly withheld from Brule’s final pay cheque to cover the cost of his cellular telephone. Brule appealed the Determination on April 1, 1997, seeking unpaid commissions of \$1,800 for sales completed before his termination and either a year’s wages of \$72,000 or an amount equal to 15 per cent of the Employer’s gross sales from April 1, 1996 through April 1, 1997 in the amount of \$79,888.36. On April 4, 1997, Mr. Gayman, acting on behalf of the Employer, filed an appeal against the section of the Determination that found that Brule was entitled to length of service compensation. Evidence was presented at the hearing under oath. At the beginning of the hearing, the parties and I agreed to hear evidence and argument on the issue of Brule’s termination of employment first and then address the remaining issues in dispute.

ISSUES TO BE DECIDED

The issues to be decided in this case are whether Brule was entitled to length of service compensation, was he entitled to damages for wrongful dismissal and was he entitled to commission payments.

FACTS

Brule was hired on September 5, 1995 as the Employer’s sales manager. On April 1, 1996, he became the commercial sales manager, which entailed additional duties. At that

time, Brule told Mr. Bayne Vardy ("Vardy") that he required higher compensation in recognition of his increased responsibilities. During this period, the Employer engaged a consultant to suggest changes to its business practices. One document ("B-400") prepared by the consultant was a job description for the commercial sales manager position. The job description included supervision of the installation of equipment. Vardy testified that the Employer followed that practice, i.e., the commercial sales manager was responsible for ensuring that contracted work was completed properly. Some of these duties were those of a project manager. Both Vardy and Brule signed the job description on June 17, 1996. B-400 contained terms of employment, including a base salary of \$1000 per month, and a commission structure that included a 15 per cent bonus on the "Gross Profit of the Commercial Sales Division for months when revenue goals have been attained." A second document ("S-200") contained "General Sales Policy Guidelines." The relevant portion of S-200 was that commissions would be "paid on funds actually collected from the customer, based on the original contract price." Previously, sales staff received full commissions after the customer paid a ten per cent deposit. According to Vardy, the Employer had incurred losses when sales staff left the company after receiving a commission but before the completion of work and full payment from the customer.

Despite the changes suggested by the consultant, the commercial sales portion of the Employer's business did not prosper. Vardy decided to terminate Brule. Vardy gave Brule a written notice of termination dated September 5, 1996, although it was not clear whether Brule received the notice on September 5 or 6. The notice told him that his position was being eliminated. It further stated:

The position will officially be closed as of September 5th 1996, although we offer you two weeks to clean up all present customer complaints and any that may come in as a result of sales that you are eligible (sic) for commissions, finalize, co-ordinate and manage all present sales. If after two weeks you still have any outstanding jobs to be completed and paid for we will welcome you to see them through to the end so as to maximize on your commissions.

You will no longer be required to manage any new sales as of September 5th 1996.

Brule stated that Vardy told him that he was fired on the morning of September 5 and then wrote the letter. Brule also testified that Vardy told him that he would be required to clean up unfinished jobs, including work as a service technician if necessary. Brule refused on the grounds that installation work was not part of his job as commercial sales manager. After receiving the September 5 letter, Brule continued to fulfill his duties. He inspected at least one construction site where a customer was working. He also visited the Unemployment Insurance office that day or the following day. According to Brule, the staff

there told him that the letter from Vardy did not state that he had been fired or wrongfully dismissed. To establish his status, Brule said that he was told he needed another letter.

The following day, presumably the morning of September 6, Brule asked Vardy for a second letter of dismissal. The letter stated:

After your request for a ride home on the morning of September 6th 1996 and not making yourself available for work over the past one and a half days, despite many phone calls, I am only to consider that you no longer want to work for BC Furnace Service Ltd.

This letter has been prepared as you requested, to officially fire you on the afternoon of September 6th 1996.

All commissions due for jobs that have been paid for by the customer up to September 6th 1996 will be paid to you, less any necessary deductions

Brule acknowledged that when he asked for the second letter, he did not intend to continue working for the Employer. He was not willing to do technician work. He came to the Employer's premises in a company van, but had cleaned out all personal effects. Brule and Vardy agreed that the meeting leading to the second letter was emotional. Vardy claimed that Brule refused to leave the office until he (Vardy) wrote the September 6 letter. He denied asking Brule to do any installation work himself. After the meeting, a member of the Employer's staff drove Brule home.

The Director's Delegate stated to the Tribunal that Brule had told her that he was pursuing legal action to recover commissions due to him so that she did not include that matter in her investigation. On September 10, 1996, Brule wrote to a member of the Employer's staff demanding that he be paid approximately \$1800 in commissions for work that Brule had sold and that was underway when he was terminated. Vardy testified that when he wrote the September 5 letter, he was referring to the same jobs that Brule listed in his September 10 letter. Had Brule continued to work, he would have been eligible for commissions as those jobs were completed. None had been completed on September 6 and some were not completed until long after Brule's termination.

ANALYSIS

The issue of Brule's termination turns on the facts of the events of September 5 and 6, 1996. The Employer's letter of September 5 clearly met the requirements for notice of termination under Section 63(3) of the *Act*. While there is conflict between the evidence presented by Vardy and Brule, the Employer's position is preferable. Vardy admitted that several contracts Brule had obtained for the firm were incomplete on September 5. He

also testified that the commercial sales manager was responsible for ensuring that the work was completed properly. When Brule or any other sales person left the company, someone else had to supervise the work. In some respects, the Employer was at a disadvantage when Brule left the work force with no notice. Brule stated that when he came to work on September 6, he did not expect to work again for the Employer. The contrast between his actions on September 5 and September 6 is notable. On September 5, he continued with his duties as commercial sales manager. Without any further contact with the Employer, he came to work on September 6, demanding a letter stating that he had been fired and having removed his personal effects from the company van. An employee should not be in a position to benefit by receiving length of service compensation for insisting that he be terminated.

Based on the evidence presented, there are no grounds for awarding Brule commissions for work underway when he was terminated. Withholding the commissions until work was completed was consistent with the Employer's policy in document S-200. Clearly, Brule was dissatisfied with the change in his conditions of employment, but he did not take legal action in May 1996. Instead he accepted the new Employer policy. The Employer applied the policy in his case, so there is no basis for a successful appeal.

The *Act* does not give the Tribunal the authority to award wages for unjust dismissal beyond the levels established in Section 63, i.e., two weeks' wages after 12 months of service, in this case.

The Director's Delegate filed a statement with the Tribunal asserting that Brule undertook other remedies to recover the bonus he claimed he was owed. In his appeal, Brule stated that he was entitled to 15 per cent of "gross sales" for the period of April 1, 1996 through April 1, 1997. The job description, document S-200, which he and Vardy signed, refers to a 15 per cent bonus on "gross profit of the commercial sales division." Vardy testified that the division was losing money, which caused him to terminate Brule. The Tribunal is an appellate body. Except in the most unusual circumstances, it should not address issues not before the Director's Delegate when the Determination was issued.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, the Determination of March 12, 1997 should be varied to eliminate the entitlement to length of service compensation and the vacation pay flowing from it.

BC EST #D361/97

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Mark Thompson
Adjudicator
Employment Standards Tribunal