

An appeal

- by -

Ranbir Rai operating as Blue Jay Transport  
(the "Employer")

- 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:** Ib S. Petersen

**FILE No.:** 2001/271

**DATE OF HEARING:** June 21, 2001

**DATE OF DECISION:** July 9, 2001

## **DECISION**

### **SUBMISSIONS:**

Mr. Ranbir Rai    on behalf of the Employer  
Ms. Tj Rai

Mr. Glen Sanders                                    on behalf of himself  
Ms. Leona Kellie

### **OVERVIEW**

This matter arises out of an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the ‘Act’), against a Determination of the Director issued on March 14, 2001. The Determination concluded that Sanders was owed \$4,453.12 by the Employer on account of wages.

The delegate’s findings and conclusions may be briefly set out as follows. Rai is the owner of a truck, performing deliveries in British Columbia. Sanders worked from August 24, 1999 to December 17, 1999 as a driver at the rate of 50% commission. The employer’s position was that the rate was 35%. The delegate accepted Sanders’ version. An amount of \$3,620.00 was paid in cash. The Employer took the position that this amount constituted full payment of wages and vacation pay. The Employer sought to off-set damages caused to the truck. The delegate did not accept the Employer’s right to off-set. The delegate obtained information from the companies services by Rai’s truck and based on the revenue calculated that Sanders was entitled to an additional \$4,453.12 including interest. The delegate accepted the Employer’s argument that vacation pay was included.

### **FACTS AND ANALYSIS**

The Employer appeals the determination. The Employer, as the appellant, has the burden to persuade me that the Determination is wrong. At the hearing, the parties agreed that the only ground of appeal was the percentage of commission: 35 or 50%.

I turn to that issue. The Employer had three witnesses: Sanders’ successor in the position, G. Auluck, Rai himself and his wife, Tj Rai. The first witness, Auluck, testified that he was paid a commission of 30% and that Rai had told him that he paid Sanders 30%. He also mentioned that the truck “was in bad shape” when he picked it up. Rai testified that Sanders was a poor driver and that he lost contracts for that reason. In my view, Rai did not assist his case when he, in direct evidence, stated that he “did not agree on any percentage at the beginning.” He maintained, however, that there was a subsequent agreement where Sanders agreed to drive on the basis of a 35% commission. He also stated that Sanders knew that 50% would be

unreasonable and that no-one could survive in business that way because of fuel and insurance costs etc. Tj Rai's testimony was much to the same effect.

Sanders and Kellie also testified. Sanders explained that he initially worked for another company, Pemberton, at 35% commission. He stated that Rai did agree to the 50% commission rate because he desperately needed a driver for his truck--apparently Rai did not have the appropriate class of license for the truck. As well, at the time, he had an offer of employment with another trucking firm offering a good hourly rate and benefits. His evidence was that he would only work for Rai on the basis of a 50% commission.

Considering all the evidence given at the hearing, I prefer Sanders' version of the events over Rai's. First, in my view, Rai was quite equivocal with respect to the initial agreement between himself and Sanders. He explained, on the one hand, that Pemberton put Sanders on his truck and he did not know at what commission rate. On the other hand, he maintained that he was the employer and decided the rate for his drivers. Second, I am not, in the circumstances, persuaded that there was an agreement for 35% based on the mere suggestion that anything higher would be unreasonable. Parties to employment agreements sometimes enter into agreement that, in hindsight, prove to be disadvantageous for one party or another.

In short, I accept the delegate's conclusions with respect to the commission rate. I am of the view that the Employer has not discharged the burden on the appeal and it is dismissed.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated March 14, 2001, be confirmed.

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**Ib S. Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**