Employment Standards TRIBUNAL

An appeal

- by -

Kamloops Ford Lincoln Ltd.
("Kamloops Ford Lincoln")

- 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.: 2001/179

DATE OF HEARING: June 22, 2001

DATE OF DECISION: July 19, 2001

DECISION

APPEARANCES:

on behalf of Kamloops Ford Lincoln Ltd.	W.J. Wozniak, Esq. Wayne Reynaud
on behalf of the individual	In person
on behalf of the Director	Jennifer Hagen

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Kamloops Ford Lincoln Ltd. ("Kamloops Ford Lincoln") of a Determination that was issued on February 7, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded Kamloops Ford Lincoln had contravened Part 3, Sections 18(2) of the *Act* in respect of the employment of Michael Gyger ("Gyger") and ordered the Kamloops Ford Linclon to cease contravening and to comply with the *Act* and to pay an amount of $3,052.73.

The amount found to be owing was for payment of 1% of the net dealership profits for the years 1998 and 1999, and interest on that amount under section 88 of the *Act*. Kamloops Ford Linclon says the Director erred in concluding any money was owed to Gyger under the *Act*. They give two reasons for their position: first, the payment of a percentage of net dealership profits was not wages under the *Act*, but was a bonus paid at the discretion of the employer; and second, even if it was wages, the employer had reduced Gyger's wages by the disputed 1% in 1998 and it was not payable for either that year or for 1999.

ISSUE

The issues in this case are whether Kamloops Ford Lincoln has demonstrated there was any error in the conclusion in the Determination concerning the wages payable to Gyger and whether, notwithstanding the first issue, the monies in question were not wages, as that term is defined in the *Act*.

THE FACTS

Kamloops Ford Lincoln is a car dealership. Gyger was employed from March 11, 1989 to August 22, 2000. At the time his employment ended, he was a sales manager for Kamloops Ford Lincoln. He was paid a combination of salary and percentage of profits. The Determination referred to an undated letter addressed to Gyger, which set out his pay scale for 1996. The letter

provided that Gyger would be paid a base salary of $4000 per month, a bonus of 2% of Departmental net, to be paid monthly, and an additional bonus of 3% of dealership net profits in excess of 600,000.00 a year, to be paid annually. That wage was paid to Gyger for 1996 and 1997.

Gyger said he believed he was also being paid according to the above terms during 1998 as well. He had no reason to believe differently. In March 2000, Gyger said he found out, by accident, that the 3% bonus on dealership net profits had been reduced to 2% for the years 1998 and 1999.

Wayne Reynaud, one of the owners of Kamloops Ford Lincoln, said the bonus, paid on percentage of dealership net profits, was introduced as part of Gyger's compensation package in 1996. It was not paid in 1995. He also said that Gyger's wage structure was altered for 1998 and 1999 by a reduction of the bonus paid on a percentage of net dealership profits, from 3% to 2%, and that Gyger, along with other employees, was verbally notified of that alteration in early 1998. The Determination notes the following, when setting the employer's position:

> [Mr. Reynaud] said he advised Mr. Gyger and other affected managers in advance that their percentage was being reduced, but he had not committed the information to writing. He had no specific recollection of when he told them.

Gyger says he was never advised, either verbally or in writing that his percentage of dealership net profits was being changed from 3% to 2%. The Director accepted that Gyger had not been notified of the reduction:

> There is no suggestion that the reduction was reduced to writing. I do not believe the employees were notified of the reduction.

The Director concluded the bonus paid on a percentage of net dealership profits was wages under the *Act* because it was paid as an incentive and was related in a material way to Gyger's "hours of work, production or efficiency".

ARGUMENT AND ANALYSIS

Mr. Wozniak, on behalf of Kamloops Ford Lincoln, argued that, as a matter of fact, Kamloops Ford Lincoln had reduced Gyger's compensation package by 1% of the net dealership profits in early 1998, the same amount found to be owing by the Director. He said that it should not have been Kamloops Ford Lincoln's burden to show what the wage was not, but Gyger's burden to show what it was. The only uncontradicted evidence of Gyger's compensation package was the letter showing his 1996 compensation package and there was no evidence indicating the 1996 wage package would continue unchanged in each subsequent year. Related to this argument, Mr. Wozniak contended that an employer generally, and Kamloops Ford Lincoln specifically, does not have to provide written notice of a change in an employee's wage. Additionally, he argued

that in any event the bonus paid on a percentage of net dealership profits was paid at the discretion of the employer and as such was not wages under the *Act*.

The Director submitted that issue of deciding Gyger's total wages for the purpose of determining the complaint was a question of fact and was decided on a balance of probabilities based on the available material. The Director noted that while Mr. Wozniak suggested the compensation package was identified as being for 1996, the same terms continued through 1997. The Director argued that if Kamloops Ford Lincoln wished to change Gyger's compensation package, it was required to clearly communicate that change to him.

The Director supported her submission with the Tribunal's decision in *Re Director of Employment Standards*, BC EST #D219/98 (Reconsideration of BC EST #D480/97), where it was indicated that if an employer wished to make a substantial alteration in the conditions of employment of an employee, written notice of such change had to be provided if the employer wished to avoid liability under Section 63 of the *Act*. The Director also referred to principles relating to the requirement for an employer to provide notice of a substantial change in terms and conditions of employment in the context of constructive dismissal. I do not find the decision of the Tribunal or the principles relating to constructive dismissal to be particularly helpful in deciding the issue of entitlement under the *Act* to wages.

Nor do I agree that the Tribunal's decision in *Re Director of Employment Standards*, *supra*, is particularly relevant to the conclusion reached. The issue in that case was whether the employee was entitled to length of service compensation because he had been deemed dismissed under Section 66 of the *Act* by reason of a significant change in his hourly wage without notice of that change being provided. The case does not say the change in the wage rate was void or without effect. What the Tribunal said was that if an employer wished to avoid liability under Section 63 of the *Act* when a change in a condition of employment substantial enough to trigger a deemed termination of employment under Section 66 of the *Act* was made, written notice equivalent to that required under Section 63 had to be given. However, that decision said nothing about any general statutory requirement to provide clear written notice of a substantial change in a condition of employment. In this case, Gyger is not seeking length of service compensation.

That conclusion, however, does not change the result, as I agree that in the circumstances the burden was on Kamloops Ford Lincoln to show that Gyger was, at least, aware there had been a reduction of his compensation package and had expressly or tacitly agreed to it.

There was clearly an agreement in effect between Kamloops Ford Lincoln and Gyger to a compensation package in 1996. That same compensation package continued through 1997. Gyger said there was nothing that occurred through 1998 and 1999 to suggest his agreement with Kamloops Ford Lincoln had changed. The Director accepted that assertion from Gyger as a matter of fact and I have no reason to alter it. Mr. Reynaud's recollection on that point was very vague. Mr. Wozniak's reliance on *Re Lisa Julson*, BC EST #D106/97 is misplaced. There was no "misunderstanding" in this case, as there was in that case, about the components of the wage

package. The *Julson* case turned on the failure of Julson to show any agreement for the wage she claimed:

> Julson bore the onus of establishing that her wage was $40,000.00 per year. To meet that onus, she was required to demonstrate that both parties to the transaction, *i.e.*, herself and In Stitches as represented by Dodge, agreed to a specific rate of pay. No such evidence was presented.

In this case we have the agreement to pay Gyger according to the terms of the letter showing his pay for 1996, terms which also continued through 1997. There was no uncertainty at all the terms of the contract of employment. It is Kamloops Ford Lincoln that asserts that agreement was changed in 1998. Following the well settled rule in civil cases, he who alleges must prove. Gyger denies being notified of, or agreeing to, any change in the compensation package. An employment relationship is contractual. Like any contract, changes to its terms must demonstrate mutuality. Kamloops Ford Lincoln has not shown Gyger ever agreed to a change in his compensation package. I do not perceive the decision of the Director to be anything more than a finding to that effect. In her reply submission to the appeal, the Director made the following comment:

> [Gyger] found out inadvertently in 2000 that the pay scale had been changed without notice to him in 1998. Had he been advised at the time the change went into effect, he would have had the opportunity to consider it and decide whether or not to accept it. He is entitled to be paid what he bargained for and what he thought he was being paid.

That is the crux of the matter. Gyger had an agreement to a compensation package that included 3% of dealership net profits. There is no evidence that agreement was ever varied and Gyger is entitled to have the agreement enforced.

On the issue of whether the 3% bonus paid on a net dealership profits was wages for the purposes of the *Act*, in the appeal the Director relied on the finding made in the Determination, that the bonus was an incentive relating to hours of work, production or efficiency, a finding that was not challenged at the appeal hearing. That finding had some support in the evidence given by Mr. Reynaud, who said the bonuses in Gyger's compensation package were based on departmental and company performance, one calculated each month, the other determined at year end. The relevant part of the definition of wages in the *Act* reads:

> ***"wages"*** *includes*
>
> . . .
>
> *(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,*
>
> . . .

but does not include

. . .

(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,

Mr. Wozniak argued that the percentage of net dealership profits was not paid to all employees, only to those who were management employees in the various departments and it was unrelated to their personal hours of work, productivity or efficiency, but to the profitability of the business generally. On this issue, I agree with the analysis provided in the Determination

> The Cambridge International Dictionary of English defines "incentive" as "something which encourages a person to do something". The percentage of profits portion of Mr. Gyger's compensation package fits this definition. Mr. Gyger understood that if he worked hard and did a good job the benefit to the employer would also mean a benefit to him. That indicates that those amounts were wages pursuant to the Act. Mr. Wozniuk [sic] argued that those amounts were not calculated on the total number of hours Mr. Gyger worked, and that the dealership net profits had nothing to do with Mr. Gyger's hours of work, production or efficiency, or even the productivity of his particular department. However, the definition does not say that the "hours of work, production or efficiency" must be that of the employee alone.

The cases referred to and relied on by Mr. Wozniak, *Re Bell*, BC EST #D408/98 and *Re Wilson*, BC EST #D398/99, do not assist on this point. The decision in *Re Bell* turned on a finding of fact that the bonus was "predicated on the individual employee's total hours worked, their work performance and the company's relative financial success during the year". There was a finding made in this case that the bonus was related to "hours of work, production or efficiency". In *Re Wilson*, the Tribunal found no evidence that the profit sharing plan, which the employee claimed was unpaid wages, was related to "hours of work, production or efficiency". The Tribunal noted:

> The definition of wages does not cover profit sharing plans that do not relate to "hours of work, production or efficiency".

I am not persuaded by Kamloops Ford Lincoln there is any error in the Determination sufficient to justify intervention by the Tribunal.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 7, 2001 be confirmed in the amount of $3,052.73, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal