

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C. 113*

- by -

C-O-E Posscan Systems Inc.  
("Posscan")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** James Wolfgang

**FILE NO.:** 1999/426

**DATE OF HEARING:** September 24, 1999

**DATE OF DECISION:** October 21, 1999

**DECISION**

**APPEARANCES**

Blaine Rowlett	C-O-E Posscan
Ray Lee	C-O-E Posscan
Dennis Law	for himself

**OVERVIEW**

This is an appeal by C-O-E Posscan Systems Inc. (Posscan) pursuant to Section 112 of the *Employment Standards Act (the "Act")* from a Determination dated June 14, 1999. The Determination found Posscan had contravened Part 3, Sections 18 and 21 and Part 7, Section 58 of the *Act*. Posscan was ordered to pay Dennis Law (Law) \$19,022.09.

During the investigation Posscan agreed they owed Law \$4,084.80 as regular wages. The question of banked time in the amount of \$544.64 was resolved. They were able to agree on vacation pay in the amount of \$1,562.21 and vacation pay for August 1998 in the amount of \$245.08. Finally they agreed on additional commissions for the period September 1997 to March 1998 in the amount of \$283.47. This left the claim by Posscan for the recovery of \$2,723.20 for vacation time and the payment of commissions to Law for the period April 1997 to August 1998 in the amount of \$11,172.86 and vacation pay on that amount of \$687.38.

In the Director's Submission to the Tribunal dated July 20, 1999 the delegate reduced the \$19,022.09 to \$18,315.06. This was the result of a correction to vacation pay. A penalty of \$0.00 was imposed.

**ISSUE TO BE DECIDED**

Does Posscan owe additional money for commissions and vacation pay earned between April 1997 and August 1998?

**FACTS**

Posscan employed Law as Department Manager for the video department from January 1, 1997 until August 21, 1998. He was paid \$5,897.00 per month plus 2% commission on video sales.

In April 1998 Posscan claim a meeting with Law changed the commission structure. As the video department had lost over \$348,000 in the year April 1997 to March 1998 they would only pay Law a commission of 2% in any month in which sales in the department met a target of \$200,000 before taxes. If the target was not reached no commission would be paid. There was a dramatic loss in sales in the period April 1998 to August 1998 therefore no commission was payable.

Law denies a meeting took place in April, which changed the commission structure.

Posscan claim Law never raised the question of commissions owed after April 1, 1998 even though no commissions were paid and no commission forms were generated. Commission forms are only produced when commissions are payable. This they claim is acceptance by Law of the change in commission structure. A letter dated July 6, 1999 was submitted by Posscan, signed by Holly Lenk, Office Manager, indicating Law never raised the question of commissions after the April meeting. She took this as tacit agreement with the change in the commission structure.

Law said the commission reports came out quarterly and he was waiting for the 2<sup>nd</sup> quarter report, thinking it was delayed in the payroll office.

The total sales for the video department dropped drastically in the second and third quarter. Posscan claim Law was busy starting his new company and not concentrating on Posscan. Law indicates Posscan was having financial difficulties and could not get performance bonds therefore he was unable to bid on large projects.

Posscan accuse Law of taking time off without informing management in the second and third quarter. Posscan believe Law used this time to form his new company. They produced a letter from the former sales manager who states Law took time off on a day-to-day basis and asked him "to cover for me". They have requested the recovery of two weeks wages from Law in the amount of \$2,723.20.

Law claims this is a pure fabrication and, if he wanted to take time off, he had a large amount of time in his overtime bank that he could have used. He has made no claim to have this overtime bank paid out, as there are no records of the dates worked. Posscan does admit, as a manager, he would have worked extra hours.

On August 21, 1998 Law resigned from Posscan and formed a new company in competition with Posscan. The former office manager and the entire staff of the video department also resigned from Posscan and were hired by Law.

There is a court case pending in which Posscan claims Law and several others removed files and other documents from Posscan. Posscan claim the damage was so severe they were unable to restart the video department and sold that part of the business at a loss.

Law denied he took any documents from Posscan.

The delegate varied the Determination in a submission to the Tribunal dated July 20, 1999. The calculation of vacation pay had been reduced from \$687.38 to \$17.01. This changed the amount of the total wages owing to \$17,365.43, reduced the interest owing to \$949.63 and the total owed to \$18,315.06.

## **ANALYSIS**

Posscan hired Law from the company they purchased when the video department was set up. The terms were wages of \$5,897.00 per month plus a 2% commission on sales before taxes. There was no contract of employment signed at the time Law was hired. Posscan claim they had a contract drawn but Law refused to sign it. We have no record of that contract.

Posscan had successfully operated the video department in the early period after Law was employed. The company later recognized the business was in difficulty when losses from the department rose substantially. They claim they attempted to cut costs by meeting with Law in April in which they put a threshold on his commission. The new threshold was if sales were less than \$200,000.00 per month no commission would be paid. Commission would be paid for any month in which sales exceeded \$200,000.00.

Law denies that meeting took place and Posscan cannot provide any confirmation in the form of notes or a contract to support their claim. Posscan did supply a letter from the office manager; Holly Lenk dated July 6, 1999. In that letter Lenk stated:

“While in the employ of COE Posscan Systems Inc. in the capacity of Office Manager I had occasion to speak with Dennis Law regarding his commission owed. He was aware that the payments issued to him were advances toward his commissions earned for the period April 1997 to March 1998. He would occasionally ask me how much was remaining because he knew that income taxes would have to be remitted against his earnings.

Just before leaving COE Posscan Systems, Mr. Law asked me for a copy of his commissions outstanding. He was given a photocopy of the same report he since submitted to Employment Standards.

He never questioned as to why there were no figures shown for April 1998 onward. I took this action to show his acceptance of these figures, and that there were no subsequent commissions owed because his sales totals were not met”.

The Determination found insufficient evidence to support such a major change and therefore relied on the position of Law that the commission policy had not been changed.

I have some difficulty with the fact Law took no action from the end of March 1998, when his last commission was paid, to August 1998 to find why his commission was not being paid. Commissions were paid quarterly and he would normally expect a commission cheque at the end of June 1998. Law, according to Holly Lenk, raised the question of the amount in his commission account, requested and received a copy of the account summary, and did not question why no commissions were shown from April 1, 1998 onward. However, Posscan has been unable to provide sufficient evidence to convince me to change the Determination. It is the responsibility of the appellant to provide the adjudicator with reasons why the Determination should be altered.

The Determination found that Posscan could not deduct \$2,723.00 from Law for the alleged time he took off. The Director's Submission dated July 20, 1999 states:

(b) In point (iii) of Mr. Rowlett's July 6, 1999 letter, he argues that the deduction contemplated (\$2,723.20, gross) would be appropriate under the circumstances which he describes.

While such circumstances as Rowlett has described would likely support the contemplated deduction, it remains the case that there is insufficient evidence to accept the argument that such circumstances did, in fact, exist. Consequently, alteration of the Determination in this regard does not seem appropriate.

That finding of the Determination is upheld.

The manner in which Law left Posscan, including the hiring of the former employees, might cause one to question his credibility however that matter is to be dealt with in another forum.

The amended Determination found Posscan was liable for total wages, including interest, in the amount of \$18,315.06. Without evidence to convince me that the Determination should be changed I find the Determination is confirmed

**ORDER**

In accordance with Section 115 of the *Act* I confirm the Determination dated June 14, 1999 and the revised Director's Submission dated July 20, 1999. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

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**James Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**