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 -

George D. Blakely
("Blakely")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	David B. Stevenson
FILE NO.:	1999/393
DATE OF HEARING:	October 1, 1999
DATE OF DECISION:	October 21, 1999

DECISION

APPEARANCES

for the appellant	In person
for Cranbrook Flooring Ltd.	Ross Young, Esq. Harold Eaton

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by George D. Blakely ("Blakely") of a Determination which was issued on June 7, 1999 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Blakely had been paid all wages earned by him under the *Act* in respect of his employment with Cranbrook Flooring Ltd. ("CFL").

ISSUE TO BE DECIDED

The only issue to be decided in this appeal is whether Blakely has shown the Determination was wrong in its conclusion that his rate of pay was not as he alleged in his complaint. The onus to demonstrate an error in the Determination is on Blakely.

FACTS

This appeal was heard together with an appeal under Section 112 of the *Act* of another former employee of CFL, Richard Norman (BC EST #D462/99), which raised the same issue. I have considered all the evidence received and have reached the following conclusions of fact.

Blakely commenced his employment with CFL on May 20, 1997. Until March, 1997, Blakely had been employed as the Building Maintenance Manager by Versa Services Ltd at Cranbrook Regional Hospital, which had the building maintenance contract at the hospital. Blakely was dismissed by that employer in March, 1997 when they lost the contract.

Blakely had no previous experience as a salesman, but Harold Eaton ("Eaton") saw potential and offered him a sales position with CFL. Before commencing his employment, Eaton and Blakely discussed the terms of employment, including his wage rate. Eaton asked Blakely how much he needed and Blakely told him he needed $5000.00 a month. Eaton told him he would not make that much to start but could expect to make way more than that once he got some experience. Blakely says that Eaton told him he would pay him $3500.00 a month a salary, plus a 30 % commission on sales, paid twice yearly, plus $350.00 a month for expenses, plus pay all his gas. He was unclear in his evidence about whether the commission was to be paid on the total value of his sales or on the gross profit margin of his sales.

Blakely was employed as a salesman for CFL for just over 12 months. His employment with CFL was terminated May 31, 1998. CFL has been in business since 1974.

Eaton says that Blakely was hired on the same basis as any other salesman, which was on an earnings draw of $3500.00 a month against commission earnings of 30% on the gross margin of the sale, a vehicle

allowance of $350.00 a month, plus expenses. He says there was no agreement or promise to pay Blakely a salary plus commission and such an arrangement would generate an 8 - 12% loss each year. He said that Blakely was being paid in the same manner as any other salesman and in support of this assertion he produced an undated document, headed: "COMMENCING JULY 1988 UNTIL OTHERWISE REVISED" and which sets out a remuneration schedule for commissioned salesmen, and is consistent with the wage structure he said Blakely had at CFL. Included in that document is the following paragraph:

> Commissions are to be paid on a six month basis, with a $3500.00 Draw Advance per month. At the end of the six month period, Commissions will be reviewed with the Manager, should Commissions exceed the Advance Draws paid to the Salesman, those monies become payable at the end of the month.

Blakely said he never saw this document.

I also received evidence from two current salesmen employed by CFL, Jonathan Eaton, Harold and Peggy Eaton's son, and Craig Larson. Both employees had been interviewed by the delegate during the investigation. The Determination describes the interviews as follows:

> The Branch interviewed two other sales employees, Jonathan Eaton (son of Harold Eaton) and Craig Larson. Both were interviewed without notice to the employer or the interviewees. Both stated that they had worked under the straight 30% commission basis with a $3500.00 per month draw against commission.
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> Further they both indicated they had changed to a salary plus commission basis recently, but the commission rate was no longer 30% rather it was 3%. Both people interviewed stated that the business would lose money on a $3500.00 per month salary and 30% commission remuneration package. There is not enough profit margin to pay that.

Both employees confirmed the information contained in the first paragraph of the above statement in their evidence before me. Mr. Larson also stated that the method of paying the commission earnings in excess of draws, which was based on a six month period, payable at the end of the month following the six month period, is somewhat unusual, but it worked at CFL. Both employees also said that even if commission earnings did not reach or exceed the level of the monthly earnings draw no attempt was made by CFL to "claw back" any of that draw.

Blakely said in his submission that I should reject the evidence of Larson and Jonathan Eaton, but did not establish any basis why I should reject their evidence and I will not do so.

From the commencement of his employment until his termination, the records of CFL do show that Blakely was paid $3500.00 a month, $350.00 a month vehicle allowance and expenses. There is no dispute about this. The records also show that the amount of commission earnings credited to Blakely by CFL during his employment did not exceed the total amount of the monthly payment of $3500.00. According to the records of CFL, by mid-December, 1997, Blakely had commission earnings on the gross profit margin of his sales that totaled $19,587.18. Blakely does not accept this figure, or the figures showing his commission earnings for 1998, suggesting the actual figure is higher, and says if his appeal is successful a forensic audit is required to determine his actual commission earnings during his employment. Finally, the records show that Blakely was paid an amount of $10,000.00 in December, 1997. The evidence of Eaton and Peggy Eaton, the financial manager for CFL, relating to the payment of this amount was significantly different from the evidence of Blakely.

On December 15, 1997, Blakely was issued a cheque in the amount of $11,509.49. The statement attached to the cheque identified the amounts paid on that cheque as:

EARNINGS . . .	$1750.00	
TRAVEL . . .		$350.00
COMMISSIONS . . .		$10000.00

Income tax and deductions were only paid on the earnings and travel portion of the cheque, an amount of $2100.00. The Year To Date summary on the statement showed that the $10,000.00 was not included in Blakely's taxable earnings for 1997. There were some documents introduced by CFL that indicated the amount was recorded as a loan issued to Blakely against 1998 commission earnings. CFL produced a "payroll preview" printout for the period ending December 15, 1997 that stated:

EARNINGS . . .	$1750.00	
TRAVEL . . .		$350.00
LOAN		$10000.00

The evidence given by Peggy Eaton relating to why the $10,000.00 amount would be shown as "COMMISSIONS" on the pay cheque statement and "LOAN" on the payroll summary, which was an earlier document, was unsatisfactory.

A letter from CFL's accountant, dated in September, 1998, noted that the amount was recorded as an advance on 1998 commissions and was shown as an account receivable when he prepared the 1997 financial statements for CFL.

Eaton said in his evidence that the $10,000.00 was paid to Blakely at his request because Blakely said he needed it to support his wrongful dismissal action against his former employer. He said that Blakely had asked three times to borrow that amount and in December he finally agreed to his request because Blakely said he might lose his house. Eaton said the amount was a loan, which was supposed to be repaid by the end of December, 1997. There is no evidence that CFL ever took any steps to secure repayment of the loan until late August, 1998 when they retained Andwell Collection Services to recover the amount. even though in the termination letters given to Blakely and Norman on May 29, 1998, CFL stated, "for the past four months, Cranbrook Flooring Ltd. has run a deficit of approximately $14,000.00 per month".

Peggy Eaton testified that she was instructed by Eaton in December to prepare a cheque in that amount $10,000.00 for Blakely. She was told by Eaton that it was a loan. She said that she told Eaton that CFL could not afford to loan out that amount of money, but Eaton said that Blakely might lose his house if he didn't get it. No record confirming the fact or the terms of the transaction, apart from the computer entries made by Peggy Eaton, was ever made by CFL.

Blakely denied there was any discussion at all with Eaton relating to his wrongful dismissal action against his former employer. He said the cheque was given to him on December 15 without any discussion and as far as he knew the cheque was for commission earnings, as it is shown on the statement. He said he never received any accounting of commissions earned and never saw any summary of commissions until CFL submitted them to the Tribunal in their appeal submission, nor did he ask for any.

The Determination concluded that there was no evidence establishing Blakely's claim that his rate of pay was $3500.00 per month plus 30% commission, while CFL had provided records that showed his rate of pay to be a $3500.00 a month draw against commission earnings.

ANALYSIS

Blakely has failed to meet his burden in this case. In his complaint, Blakely alleged his wage rate included a base salary of $3500.00 a month plus a 30% commission on sales. In the Determination, the Director concluded that the investigation failed to establish the wage rate as alleged. The burden on Blakely requires him to demonstrate, on a balance of probabilities, that the conclusion reached in the Determination is wrong and his wage rate was as he alleged in his complaint.

No one has ever disputed that Blakely was paid $10,000.00 in December, 1997. The governing factor throughout has been whether the payment of that amount, on balance, confirms or establishes that Blakely was to be paid a wage that included $3500.00 a month base salary and, in addition, a 30% commission on sales. In his appeal submission, Blakely argued that the payment of the $10,000.00 confirmed his view of his wage rate.

While the evidence presented by CFL relating to the payment of the $10,000.00 to Blakely on December 15, 1997 is equivocal and in some respects dubious, Blakely's evidence is also equivocal and I am not convinced that the totality of the evidence points to the conclusion sought by Blakely.

I agree with Blakely that some of the documents generated by CFL could be construed as a clumsy effort by CFL to disguise that the $10,000.00 was originally characterized as commissions. I also agree that it is a questionable business practice that CFL would loan an employee $10,000.00 without any confirmation from the employee of the loan and no record of the transaction. Finally, I agree that CFL has never explained its failure to discuss repaying the loan with Blakely after January 1, 1998.

On the other hand, Blakely has also never explained why, if the amount was paid to him as commissions on 1997 sales, as opposed to advance on 1998 commissions, he neither complained nor sought an explanation why this amount was not taxed and was not included in 1997 income on his 1997 T4 statement. Also, while Blakely claims he never got any summary of commissions earned, it was apparent from the evidence he presented that he had access to and knowledge of his total sales commissions in 1997. If, as he claims, the $10,000.00 was payment of 1997 sales commissions, it was almost $10,000.00 short of the total commissions earned in 1997. Somewhat surprisingly, in all the circumstances, there is absolutely no indication that he ever asked for, or even inquired about, the balance of his 1997 commissions at any time during his employment. Blakely's evidence was that the $10,000.00 was paid to him on December 15 without any explanation other than what was shown on the statement and there was no discussion following its payment. I simply do not accept that $10,000.00 would be paid, even if it was paid as earnings on commission, without some discussion preceding its payment or following its payment, if for no other reason than to confirm the reason for its payment and tell Blakely when the balance of the commission earnings would be paid.

Finally, Blakely has not given me any reason to accept that a company which has been in business for more than 25 years would agree to a wage structure guaranteed to lose them between 8 and 12% on every sale.

In the final analysis, while both sides can point to aspects of the evidence which support their positions, the burden is on Blakely to show, on balance, the Determination was wrong and I conclude that he has not met that burden. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, the Determination is confirmed.

David B, Stevenson
Adjudicator
Employment Standards Tribunal