

**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 -

Richard Norman  
("Norman")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**A**DJUDICATOR: David B. Stevenson

**F**ILE N<sub>O.</sub>: 1999/398

**D**ATE OF **H**EARING: October 1, 1999

**D**ATE OF **D**ECISION: October 22, 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 Richard Norman ("Norman") 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 Norman had been paid all wages earned by him under the Act

### ISSUE TO BE DECIDED

The only issue to be decided in this appeal is whether Norman 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 Norman.

### FACTS

This appeal was heard together with an appeal under Section 112 of the Act of another former employee of Cranbrook Flooring Ltd. ("CFL"), George D. Blakely (BC EST #D, which raised the same issue. I have considered all the evidence received and have reached the following conclusions of fact with respect to Norman's appeal:

Norman moved to Cranbrook in 1995 from Victoria where he had been the Sales Manager for the Finishing Touch Doors and Mouldings Ltd. Norman was hired as a salesman for CFL during a sales trip to Golden with Harold Eaton ("Eaton"), the president of CFL, and commenced his employment with CFL November 1, 1995. During the trip, he and Eaton discussed a number of things including Norman's remuneration. Norman says Eaton told him he would be paid a salary, of \$2500.00 a month to start, plus commission of 30% on gross profit, plus expenses. Eaton says that Norman was hired on the same basis as any other salesman at that time, which was on an earnings draw of \$2500.00 a month (to start) 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 such arrangement as alleged by Norman and that such an arrangement would be "stupid" from a business perspective and would generate an 8 - 12% loss each year. In support of his assertion that Norman was being paid in the same manner as any other salesman, Eaton produced an undated document, which is headed: "COMMENCING JULY 1988 UNTIL OTHERWISE REVISED" and which sets out a remuneration schedule for commissioned salesmen, which is consistent with the wage structure he says Norman had at CFL.

From the commencement of his employment until his termination, the records of CFL show that Norman was paid \$2500.00 a month, increasing to \$3500.00 a month in April, 1996, \$350.00 a month vehicle allowance plus expenses, in his capacity as a salesman. He also performed some floor installation, for which he was paid in addition to his sales earnings. The amount of commission earnings credited to Norman by CFL during his employment did not exceed the total amount of his monthly earnings draws. The evidence indicated that the monthly earnings draw was in effect a base salary. If there were commission earnings in excess of that amount, it was paid in addition but no attempt was made by CFL to "claw back" any of the monthly earnings draw if the commission earnings did not reach the level of the monthly earnings.

During his employment, Norman says he asked on "six to nine" occasions when he was going to receive his commission earnings and was given several different excuses why it could not be paid, such as computer problems and accounting delays. Eaton says he has no recollection of ever being asked by Norman when he would be paid his commission earnings. Peggy Eaton, who acts as the comptroller for CFL, testified that at the end of each month the salesmen, including Norman, were given a slip identifying their commission earnings for that month. She was never approached by Norman about his commission earnings.

The evidence shows that during his 31 months of employment, Norman had commission earnings totaling approximately \$69,300.00, meaning his annual salary, based on the wage rate at which he says he was to be paid, would be equivalent to approximately \$68,800.00 a year.

I 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.

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.

Norman continued to be employed as a salesman for CFL until May 31, 1998 when his employment was terminated.

The Determination concluded that there was no evidence that established Norman's claim that his rate of pay was \$3500.00 per month plus 30% commission while there was evidence from the payroll records of CFL and from their accountant that showed Norman's rate of pay to be a \$3500.00 a month draw against commission earnings.

## **ANALYSIS**

Norman has failed to meet his burden in this case.

During the investigation of his complaint Norman was unable to provide to the delegate any evidentiary support for his assertion that his wage rate included a base salary plus commission. Against Norman's bald assertion that his wage rate included a base salary plus commission, the investigation revealed that:

CFL had consistently paid him on the basis of the wage arrangement they said was in place;  
he had never earned or been paid any commission earnings in addition to the \$3500.00 a month draw;  
he was been employed for 31 months without any objective indication that he raised the question of unpaid commission to CFL, even though he was provided with details of his commission earnings on a regular basis;  
other sales employees confirmed they were paid on the same basis as CFL said Norman was paid;  
and  
a wage rate as alleged by Norman would result in a loss to the business of 8 - 12% a year.

All of the same assertions made by Norman to the delegate during the investigation have been made to me. Not a single additional piece of evidence has been presented that might confirm his position or reduce the weight of the information provided by CFL. It was suggested by Norman that a comment from a letter prepared by Mr. Larson, dated July 16, 1999, that for a 1½ year period commencing October 1993 that “he was paid on a salary, plus commission” was the same wage rate Norman said he was paid and supported his case. Mr. Larson, however, gave direct evidence that confirmed what he had said to the delegate during the investigation and the cross-examination on the letter by Norman and Mr. Blakely, the other appellant, did not affect that evidence.

**ORDER**

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

**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**