

**BC EST #D469/99**

**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 -

Adam Brody -and- Sunwest Auto Centre Ltd.

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Alison H. Narod

**FILE NO.:** 1999/487

**DATE OF DECISION:** October 25, 1999

**DECISION**

**OVERVIEW**

This is an appeal brought by Adam Brody, the “Employee” pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 30, 1999, under File No. 58967 (the “Determination”). By way of the Determination, the delegate dismissed the Employee’s complaint that his employer, Sunwest Auto Centre Ltd. (the “Employer”), owed him wages in the form of commissions. In particular, the Employee claimed that his commissions had not been calculated according to the correct formula, which would have resulted in a higher sum than was paid to him.

The appeal was conducted by written submissions and not by way of an oral hearing.

**FACTS**

The Employee was employed by the Employer as a Recreation Vehicle Salesperson between January 3 and June 30, 1999. Throughout his employment, he was paid a flat commission rate of 21% of net sales profit. A “chit” was issued to him confirming the commission he received each time he made a sale.

According to the Determination, the Employee informed the delegate that after he left the Employer’s employ, he learned that certain other former employees of the Employer had been paid greater commissions based on a higher commission structure in some types of circumstances. He did not contend that the Employer had specifically promised to pay him according to the higher commission formula. Rather, he contended that he was entitled to the higher formula because it was the Employer’s practice for those certain other employees and that the Employer would have had to advise him in writing if it was not going to apply that formula to him.

The Employer did not dispute that others were paid on the basis of a different commission formula, but said the higher commission structure was limited to employees hired prior to January 1, 1999. Employees hired on or after that date, were paid on the basis of the same commission structure as the Employee. Mr. Willis, President and Manager of the Employer, maintained that the commission structure was clearly stated to the Employee and he agreed to it when he was hired. Despite routinely receiving “chits” based on that formula, the Employee never questioned the commission structure.

The delegate concluded that there was no basis for the Employee's claim to be paid in accordance with the higher commission structure. The delegate observed that, under the *Act*, an employee's terms of remuneration are individual and separate and form individual contracts of employment. There was no evidence that the Employee and his Employer agreed that he would be paid on the basis of the higher commission structure. The Employee did not contend that the Employer had made such an agreement. Moreover, the Employer had no obligation to communicate to the Employee that his employment agreement was different from other employees.

### **ISSUE**

Was the Employee entitled to unpaid commissions calculated on the basis of a higher commission structure used to calculate the commissions paid to certain of his former co-workers?

### **ARGUMENT**

On appeal, the Employee sets out a number of reasons for appeal, the relevant ones being:

- 1) that the higher commission structure has never been effectively terminated in writing and therefore continued in effect during the Employee's employment;
- 2) that the former General Sales Manager who hired the Employee and who was dismissed shortly thereafter (whose name the Employee does not provide) explained the commission structure to him shortly after the Employee commenced employment, but the Employee did not fully understand that structure at the time; and,
- 3) that the Employee can document what he is owed with documentation in the delegate's possession.

Additionally, the Employee asks that an investigation be done of the pattern of hiring and firing by the Employer.

In response, the Employer reiterates the arguments it made before the delegate and attaches copies of the "chits" showing that the commissions paid to the Employee on each sale were paid on the basis of a flat rate commission of 21%.

**ANALYSIS**

The burden of proof is on the Employee to show on a balance of probabilities that the Determination under appeal ought to be varied or cancelled because it is wrong in some material respect.

The Employee has not shown that the delegate erred in making the Determination. Moreover, the Employee has not shown that there is any significant new evidence that he could not have reasonably made available to the delegate. The Employee knew of the evidence concerning what he was told by the former General Manager long before he laid this complaint. If he did not bring it to the delegate's attention (and he does not clearly submit that he did not), he could have done so before the Determination was made.

With respect to the argument that the former commission structure continued in force because it had not, to the Employee's knowledge, been terminated in writing, I note that the Employer says that it reached an agreement with the Employee at the time of hire about what would be his commission structure. It differed from the commission structure the Employee seeks.

There is no requirement that an Employer who has reached a specific agreement with an employee as to the terms of his employment, such as commission structure, must also inform him that a previous policy regarding commission structure does not apply to him. Nor is there an obligation on it to pay him according to that commission structure if it has not also advised him in writing that it has been terminated. In circumstances such as these, an employer can reach different agreements with individual employees about their terms of employment, provided that those terms do not otherwise contravene the *Act*.

**ORDER**

Pursuant to Section 115 of the *Act*, I confirm the Determination dated July 30, 1999.

**Alison H. Narod**  
**Adjudicator**  
**Employment Standards Tribunal**