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 -

Leister-Blake Enterprises Ltd.
("LBE" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	98/558
HEARING DATE:	November 3, 1998
DECISION DATE:	November 6, 1998

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DECISION

APPEARANCES

Mr. Robert Blake on behalf of the Employer

Mr. Richard Beattie on behalf of himself

OVERVIEW

This decision concerns appeal brought by the Employer pursuant to Section 112 of the *Employment Standards Act* (the *"Act*") against a Determination of the Director of Employment Standards (the "Director") issued on August 5, 1998 which determined that the Employer was liable for unpaid wages to Mr. Richard Beattie ("Beattie"), in the amount of $3,735.25, based on the difference between the salary paid by the Employer and what she determined was the salary agreed upon between Beattie and the Employer. The delegate found that the Employer had contravened Sections 8, 17, 18 and 27 of the Act and, as well, issued a "$0.00" penalty.

FACTS AND ANALYSIS

Mr. Robert Blake ("Blake"), a witness for the Employer, testifies that Beattie commenced employment as a sales representative with the Employer in October 1996 at a base salary of $19,700 plus a discretionary bonus based on the company's performance. In discussions between Beattie and the Employer several months before Beattie joined the Employer, in the spring of 1996, Blake offered him employment on terms which included a base salary of $25,000 and commissions based on net profits. This proposal was reduced to writing on a business card. At that time Beattie was employed by another employer, Future Electronics, where he had been for 10 years, earning an average of $62,000 per annum. Beattie testifies that he did not want to leave that employer but that LBE pursued him aggressively. Beattie turned down the offer of employment. He was concerned about, among other things, LBE' uncertain prospects.

Beattie subsequently left Future Electronics and approached LBE. He did not approach other companies for employment. Beattie testifies that the Employer, in October 1996, offered him employment on the same terms as in the spring, including a base salary of $25,000. He believed the Employer agreed to that. Beattie testifies that he did not know his salary due to the employer failing to provide proper pay statements (Section 27). However, Ms. Kim Reid ("Reid"), the Employer's office manager, testifies that she provided a pay statement to Beattie with his first pay cheque setting out the wages and deductions for the first pay period ending in October (which was not a full pay period) and the same for November 1996. The pay roll document was submitted into

evidence at the hearing and indicated that the regular monthly salary was $1,600, or $19,200 per annum. Beattie says that he does not have any record of receiving a wage statement with his first pay cheque. Beattie left the Employer's employ on May 20, 1997.

The Employer, as the appellant, has the burden to persuade me that the Determination is wrong. In this case, I am persuaded that the delegate erred when she determined that the base salary was $25,000. The delegate states that she preferred "Beattie's version regarding the matter of his salary". The delegate is certainly entitled to reach that conclusion based on her view of the relative credibility of the parties. However, in my view, the delegate erred when she put the onus on the Employer to prove the terms of the agreement. There is only a reverse onus in limited circumstances (see, for example, Section 126). To reach the conclusion that the base salary was $25,000, the delegate reasoned as follows:

1. There was no written contract of employment.
2. There was no written revision to the spring of 1996 offer of employment.
3. The wage statements did not comply with Section 27.
4. There was no "concrete evidence to substantiate Blake's position that the wages in October, 1996 were 24% less than that offered a few months previously".

First, there is no requirement for an employment agreement to be in writing. An agreement reduced to writing may simplify the process of ascertaining the terms and conditions of employment and disputes, such as the one at hand, may thus be avoided.

Second, the spring of 1996 offer of employment is only relevant insofar as it has any bearing on the agreement between the parties in October of that same year. Beattie rejected the initial offer of employment. The offer does not survive Beattie's rejection of it. The delegate must then determine the terms of the agreement in October. In my view, this means that the delegate must weigh the evidence of the parties and arrive at a reasoned conclusion. As is evident, Beattie and Blake provided conflicting statements to the delegate with respect to those terms. This, obviously, puts the delegate in the unenviable position of having to decide which version to accept. Beattie says that the offer of employment was on the same terms as offered earlier. Blake says that the offer was different because circumstances had changed. In the spring he had pursued Beattie who was then employed; in the fall, Beattie came to him seeking employment. Moreover, the company was not doing well. In my view, this may explain why the salary offered was lower.

Third, as noted by the delegate, the wage statements do not comply with Section 27. For example, they do not set out hours worked. In that respect they are deficient from the stand point of the *Act.* Nevertheless, the pay roll records add credibility to the Employer's claim that the salary agreed to was not $25,000. Reid testifies that she provided the statement to Beattie; his testimony is that he "does not have any record of receiving the statements". On the balance of probabilities, I accept Reid's testimony on this point. In my view, therefore, Beattie was certainly in a position early on

in the employment relationship to determine if he was being paid according to the agreement between the parties. In other words, there is some "concrete evidence" to support the Employer's assertions regarding the terms of employment. I hasten to add that the delegate does not appear to have had the benefit of the pay roll records produced at the hearing.

In this case, I am faced with two conflicting--but prima facie equally credible--versions of the material facts surrounding the terms of the agreement: Beattie's and Blake's. The pay roll records produced at the hearing, and Reid's testimony in regards to it, tend to support the Employer's version. On the balance of probabilities, I am prepared to accept that the agreement between Beattie and the Employer was for a base salary of $19,200. In the result, I set aside the monetary award and the penalty.

Given my conclusions, above, I do not find that the Employer contravened Section 8 of the *Act.*

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated August 5, 1998 be cancelled in its entirety.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal