Employment Standards TRIBUNAL

An appeal

\- by -

Gregg Buckley

\- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR:	John M. Orr
FILE No.:	2001/510
DATE OF HEARING:	October 3, 2001
DATE OF DECISION:	October 22, 2001

DECISION

APPEARANCES:

Gregg Buckley	On his own behalf
Perry Shea	On behalf of 601087 B.C. Ltd. operating as Newf's Furniture

OVERVIEW

This is an appeal by Gregg Buckley ("Buckley") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination dated June 20, 2001 by the Director of Employment Standards (the "Director").

Gregg Buckley was employed by 601087 B.C. Ltd. operating as Newf's Furniture ("Newf's") as a furniture salesman. He worked for four months from November 1, 2000 to the end of February 2001. He claims that at the end of his employment he was owed commissions that have never been paid to him by Newf's.

The Director investigated the claim but found that Buckley had been paid in full for all commissions based on a method of calculation wherein commissions were paid in each pay period as the sale contracts were "written". Buckley has appealed on the grounds that the Director misunderstood the basis upon which commissions were earned and paid. Buckley alleges that commissions were not paid until the furniture was "delivered" and that there were many deliveries after his employment was terminated. He alleges that he is entitled to be paid commissions on the product delivery after the termination of employment.

ISSUE

The issue in this case is whether the commissions owed to Buckley were calculated on an "as written" basis or "on delivery" and whether all of the commissions earned by Buckley have been properly accounted for and paid.

FACTS AND ANALYSIS

Buckley testified that when he was hired he was to be paid on a commission basis with a guaranteed wage equal to the minimum wage in any pay period in which he earned commissions that totalled less than the minimum wage. He testified that he was not to receive both wages and commissions. Shortly after he commenced work he negotiated with the employer that the wage portion would be increased to $1,500.00 dollars per month. This amount worked out to a wage of approximately $10 per hour. This basic formula was not really in dispute but the manner in which commissions were to be calculated and paid was disputed.

Newf's was a new furniture business in Victoria and relatively small. They did not keep a large stock on hand. In most cases the salesman would show the product to the client and if the client wished to purchase the item the salesman would write as sales contract with the client. The product would then be ordered from Vancouver or other more distant location. It might be some weeks before the product was actually delivered to the client. The client would not have to pay until the product was delivered. Thus there could be several weeks between the time that the sales contract was written and the time that the product was delivered and payment made.

Buckley asserted that his employment contract provided that his commissions were to be paid on a 'delivery' basis. For example, in his first month of employment Buckley might have written sales contracts in which the total commissions exceeded the $1,500.00 but if none of that product was delivered he would still receive his basic wage and the commissions would carry over to the pay period in which the product got delivered. As he put it this could result in a salesman building up a "bank" of commissions while receiving his basic wage in full. He claimed that this was standard in the industry and that eventually a salesman would have a sufficient bank built-up that he would not require any wage.

The important point about this method of calculation is that when Buckley ended his employment he would have a significant amount of unpaid commissions waiting until the product was delivered. He claims that he is entitled to these written but undelivered commissions.

Perry Shea ("Shea") testified on behalf of Newf's that when Buckley started work he was on commissions based on the time of delivery but that on Buckley's request this system was modified to pay him when he wrote the contracts. Shea testified that Buckley was an excellent salesman and that they wanted to keep him happy. He said that Buckley claimed that he needed the income more immediately and that he did not want to wait until delivery to get his commissions. Shea testified that when the employment contract was amended to guarantee Buckley $1,500.00 per month it was also agreed that he would get his commission on all contracts 'written' in the pay period.

The Director's delegate accepted the evidence that the commissions were to be paid on a written basis and calculated that there were no further commissions payable to Buckley after the termination of employment. While Buckley's evidence and the evidence of a witness called on his behalf raises in my mind some serious concerns about the correctness of this finding I am not sure that it is sufficient to establish on a balance of probabilities that the delegate's finding was wrong. However, I find that I do not have to make a finding on this point because I conclude that the manner in which the employer calculated the commissions included all sales whether written or delivered.

Because the calculations by the employer included all written contracts, whether or not the product was ever delivered, paid for, refused or returned, the salesman received the benefit of being credited for the commission. Thus in the final pay period in which Buckley worked he received credit for commissions on all sales 'written' right up to his last day of work. Delivery essentially becomes irrelevant because the commission has already been credited to the account of the salesperson. Even if product sold by Buckley was delivered after termination of the employment there could be no commission payable on those deliveries because the commission had already been credited to his account during his employment and taken into account on his final pay cheque.

I am satisfied that the Director's delegate accurately analysed the evidence and correctly calculated the commissions earned by Buckley and correctly found that all commissions earned had been properly credited to Buckley and that there was no further payment required. I conclude that the determination should be confirmed.

ORDER

I order, under section 115 of the *Act,* that the Determination dated June 20, 2001 is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal