Employment Standards TRIBUNAL

An appeal

- by -

BWI Business World Inc.
(the "Employor" or "BWI")

- 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: Ib S. Petersen

FILE No.: 2001/619

DATE OF HEARING: November 13, 2001

DATE OF DECISION: November 14, 2001

DECISION

APPEARANCES:

Ms. Kim Burton Mr. Rob Burton	on behalf of BWI
Ms. Jennifer Meridith Cooke	on behalf of herself
Ms. Diane MacLean	on behalf of the Director

OVERVIEW

This matter arises out of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director issued on August 7, 2001. The Determination concluded that Cooke was owed $2,401.80 by the Employer on account of outstanding commissions.

FACTS AND ANALYSIS

BWI appeals the determination. BWI, as the appellant, has the burden to persuade me that the Determination is wrong.

The Employer sells restaurant supplies at the wholesale level. Cooke worked there as a sales person from January 28, 1997 to September 18, 2000, when she quit. She was paid a minimum hourly compensation of $9.00 per hour, paid as a draw against commissions. Some five or six months into the employment relationship, Cooke and other employees were asked to sign an employment agreement which dealt, among others, with compensation and termination of employment. Commissions were payable on "closed sales" only. A "closed sale" is defined in the agreement as "a sale for which BWI has been paid by the custumer."

The agreement provided with respect to termination:

> "BWI may terminate my employment immediately without notice for cause. I understand that if I breach any of the terms of this Agreement, BWI will have cause to terminate me.
>
> BWI will terminate my employment for any other reason by giving me the following notice:
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> 1. one week's notice after three (3) consecutive months of employment;
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> 2. two weeks' notice after twelve (12) consecutive months of employment;

> 3. three weeks' notice after three (3) consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of eight (8) weeks' notive;
>
> or by giving me a combination of notice and pay in lieu of notice equivalent to the above. Where pay in lieu of notice os given, it will be calculated upon my regular weekly earnings during the last eight weeks that I worked normal or regular hours at BWI. I also understand that no commissions will be paid on any sales closed after my termination of employment with BWI."

The question before me on appeal relates to the Employer's position that it is not obligated to pay Cooke for sales that closed, *i.e.*, were not paid, until after her termination. The Employer agreed that it owed her commission earnings on sales closed prior to the termination date.

The Delegate concluded that the employment agreement was enforceable under the *Act* because commissions are, by definition, wages. She considered the Employer's position which was that the termination provision set out above--in particular, the last sentence "that no commissions will be paid on any sales closed after my termination of employment with BWI"--applied to any termination, *i.e*., also a resignation. The Delegate noted that the termination provision deals with termination at the Employer's instance and that there is no reference to what happens if the Employee resigns, as happened here. Moreover, the Delegate considered the principle of contra proferentem--that an ambiguous provision is to be construed against the person who drafted it--in light of the provision in the agreement between the parties and concluded that the Cooke was entitled to the commission payments that became payable after her employment terminated.

At the hearing, the Employer argued that the language of the agreement was clear and that Cooke was not entitled to the commissions. Burton testified that the agreement had been explained to all the employees, including Cooke, and that they had been given time to review it and receive legal advice. Those facts were not seriously in dispute. Burton also sought to adduce the--largely opinion--evidence of two other employees who agreed with her interpretation. In my opinion, that evidence is largely irrelevant in the circumstances. Moreover, insofar as the evidence speaks to the "past practice" of the parties, I am not inclined to accept it or, if I were to accept it, place much weight on it, because it is hearsay evidence and, thus, not subject to cross examination.

In my view, this matter can be disposed on based on the language of the agreement and the parties intent as it is manifested in the agreement. First, there is nothing on the face of the agreement to support the Employer's argument that last sentence in the termination provision--"that no commissions will be paid on any sales closed after [the employee's] termination of employment with BWI"--applies to circumstances where employment is terminated at the employee's instance. The provision does not expressly deal with that. Second, the provision in dispute deals, in some detail, with the Employer's obligations should it terminate the employee,

for cause or otherwise. It the parties had intended the provision to mean what the Employer now argues it means, the parties could have provided for that in their agreement. The agreement was drafted by the Employer. Third, although this point was not argued before me, I note that the agreement on its face states that it "contains the entire agreement [between the parties] with respect to [the employee's employment..." It is, therefore, somewhat ironic that the Employer now seeks to rely on pre-contractual representations as an aid to interpretation. In any event, in my view, at the very least, the provision in question is ambiguous and the principles of construction of contracts apply. In short, I agree with the Delegate's conclusions.

As I ruled at the hearing, I was not prepared to deal with the issue of "coercion" in the context of the circumstances of when the agreement was entered into. The delegate decided that it was not necessary for her to deal with that issue in light of her conclusions. I agree. In my view, the primary issue between the parties was one of contract interpretation. Only if the matter could not be resolved on that basis, would I refer the matter back to the Delegate for investigation and decision.

Briefly put, I am of the view that the Employer has failed to show that the Delegate erred and the appeal is, therefore, dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated August 7, 2001, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal