

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-

Kostandin Kocis

(“Kocis”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/625

DATE OF HEARING: February 19th, 1998

DATE OF DECISION: March 11th, 1998

DECISION

APPEARANCES

Kostandin Kocis on his own behalf
Darren Chura, General Manager for Fleetwood Motors Ltd.
No appearance for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Kostandin Kocis (“Kocis”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on July 24th, 1997 under file number 34126 (the “Determination”).

The Director determined that Fleetwood Motors Ltd. (“Fleetwood” or the “employer”) did not owe Kocis any unpaid wages and, accordingly, dismissed Kocis’ complaint in its entirety. Kocis had sought compensation for length of service, payment for an earned but allegedly unpaid commission, statutory holiday pay and reimbursement for certain unauthorized deductions.

The appeal in this matter was heard at the Tribunal’s offices in Vancouver on February 19th, 1998 at which time I heard evidence and submissions from both Kocis, on his own behalf, and from Darren Chura, Fleetwood’s general manager.

The appeal hearing was scheduled to commence at 9:00 A.M. but was delayed for some thirty minutes because Mr. Chura (who had earlier telephoned the Tribunal to advise that he would be late) was late in arriving. Upon arrival, Mr. Chura sought an adjournment of the hearing because Mr. Jim Norman, whom I understand to be the manager in charge “customer relations” for Fleetwood, was hospitalized that morning. I refused the adjournment because there was nothing in the material before me to suggest that Mr. Norman had *any* role to play with respect to any of the events in question whereas Mr. Chura appeared to be a principal party insofar as Fleetwood, and the matters in issue before me, were concerned.

FACTS

Kocis was formerly employed as a commissioned sales representative with Fleetwood, a new and used motor vehicle dealership. He left his employ in or about mid-February 1997 and subsequently filed several wage-related claims.

I propose to deal with each of Kocis’ claims in turn.

ANALYSIS

Compensation For Length of Service

Pursuant to section 63(3)(c) of the *Act*, an employer is not obliged to pay compensation for length of service, or to give written notice in lieu thereof, if an employee voluntarily quits. However, by reason of section 66 of the *Act*, an apparent “quit” can nonetheless be treated as a dismissal if the quit was in response to a substantial alteration in an employee’s terms and conditions of employment (at common law, such action is termed a “constructive dismissal”).

Kocis admits that he quit but says that he did so due to certain actions undertaken by the employer, and in particular, the employer’s announced intention to unilaterally change the commission structure. Kocis calculated that the proposed changes would have reduced his annual income by some \$8,000.

In my view, an announced intention that the commission structure might be changed, does not amount to a constructive dismissal under section 66 until the changes are actually implemented (N.B. the wording of section 66: “If a condition of employment *is* substantially altered...”). It is to be noted that the employer, while acknowledging that there was some discussion about altering the commission structure denies that the matter was a *fait accompli*. Indeed, to date, no such change has been implemented. Even if I am incorrect in holding that an alteration must have already been put into effect, at the very minimum, in order to find that a termination has occurred under section 66, the employer must have irrevocably stated its intention that a change would be effected. In this case, the evidence does not show that the employer made such an irrevocable decision, let alone implementing such a decision. At most, the employer engaged its sales employees in a “what-if” sort of discussion, in order to obtain some feedback regarding a possible change in the commission structure.

For the above reasons, and for the reasons also set out in the Determination, I cannot find that Kocis’ termination of his employment was anything other than a voluntary act. Thus, the employer was not obliged to pay any compensation for length of service.

Unpaid Commission

This particular claim relates to a sale of a used vehicle, negotiated over the telephone, which sale ultimately collapsed. It is agreed by the employer that, if a commission is payable, the amount payable is approximately the \$500 claimed by Kocis.

In my view, Kocis has made out a claim for this commission. The evidence before me, both *viva voce* and documentary, is that Kocis was instrumental in the negotiation of a binding contract of sale (including the payment of a deposit) with a customer from the Prince George area for a used Mazda 626 vehicle. I might add that Darren Chura was the very individual who finalized the sale and accepted, in writing, the customer’s offer on behalf of Fleetwood. The sales contract, Ex. 1, refers to the appellant as the salesperson of record. Later, Mr. Chura’s father, the owner of the dealership, purported to “refuse to approve” the contract.

For reasons of its own (likely because the sale would not have generated a sufficiently large profit) and much to the obvious, and documented, distress of the would-be purchaser, the employer decided not to honour the sales agreement. In my view, the employer's unilateral action in refusing to proceed with the sales agreement amounted to a breach of contract with the purchaser and such action cannot be a legally sufficient reason for denying Kocis his earned commission on the sale. If it could be said that the sales agreement was "frustrated", it was frustrated by the independent action of the employer and thus, Kocis was nonetheless entitled to his commission.

Statutory Holiday Pay

There is simply no evidence before me to suggest that the Director's determination that Kocis' claim for statutory holiday pay must fail, because a variance was in place at the relevant time, was in error. This aspect of the Determination must be confirmed.

Unauthorized Deductions

For the reasons set out by the Director's delegate in the Determination, which I adopt, I cannot find that the employer has "charged-back" any monies other than usual and reasonable adjustments based on actual commissions earned. The evidence shows that Fleetwood sales representatives were routinely advanced the entire "nominal commission" on a given sale (based on the expected "net profit") and that such advances were often adjusted at some later point in order to account for the actual "net profit" earned on the particular sale. Indeed, had the adjustments not been made, Kocis would have, in fact, received larger commissions than he had actually earned.

I might add that in each case where there was a "charge-back", Kocis admits that he sought, and received, a satisfactory explanation, usually from Mr. Chura. He only purported to reject the explanations given to him after his employment had terminated and he had filed a complaint with the Employment Standards Branch.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter be varied to reflect an amount due and payable by Fleetwood to Kocis of \$500 together with a further amount on account of interest to be calculated by the Director in accordance with section 88 of the *Act*. With the exception, as previously noted, of the Director's finding regarding Kocis' unpaid commission claim, the Determination is confirmed in all other respects.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal