Employment Standards TRIBUNAL

An appeal

- by -

Walter E. Johnson
("Johnson")

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/80

DATE OF DECISION: July 7, 2004

DECISION

INTRODUCTION

This is an appeal filed by Walter E. Johnson ("Johnson") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Mr. Johnson appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on November 17th, 2003 (the "Determination"). The Determination was issued following an oral hearing held on September 23rd, 2003.

Mr. Johnson filed an appeal with the Tribunal on February 18th, 2004. That appeal was not filed within the statutory appeal period. By way of written reasons for decision issued on May 3rd, 2004 (B.C.E.S.T. Decision No. D066/04), I extended the appeal period pursuant to section 109(1)(b) of the *Act*. These reasons for decision now address the merits of Mr. Johnson's appeal.

The parties were advised by the Tribunal's Vice-Chair, in a letter dated June 16th, 2004, that this appeal would be adjudicated based on their written submissions. I note that the appellant did not request, in his appeal form, that the Tribunal hold an oral hearing in this matter. Legal counsel for the respondent employer, Orbital Technologies Inc. ("Orbital"), submitted that an oral hearing was not required "as the entire matter turns on an issue of interpretation of the Employment Agreement".

I have before me the section 112(5) record transmitted by the Director's delegate and, in addition, the following written submissions:

- Mr. Johnson – Original appeal documents and subsequent submission dated June 9th, 2004; and
- Orbital – 50-page submission dated May 26th, 2004 prepared by Orbital's legal counsel.

THE DETERMINATION

Mr. Johnson was apparently hired by Orbital as a sales representative and was so employed from May 1st, 2001 until March 18th, 2003 at an annual salary of $100,000 plus commissions and other benefits. Mr. Johnson was away from work on disability leave during the period August 21st, 2002 to January 3rd, 2003.

The Director's delegate's reasons for decision (appended to the Determination) indicate that Mr. Johnson alleged Orbital owed him unpaid commissions and vacation pay.

The delegate held that Orbital fully complied with the parties' written agreement with respect to the payment of commissions and that no additional vacation pay or any other monies were payable by Orbital to Mr. Johnson. Indeed, the delegate concluded that Orbital "overpaid" Mr. Johnson with respect to his vacation pay entitlement. Thus, the delegate dismissed Mr. Johnson's complaint since the *Act* "has not been contravened" and "no wages are outstanding".

REASONS FOR APPEAL

Mr. Johnson asserts that the Director's delegate erred in law in rejecting his unpaid wage complaint. More particularly, Mr. Johnson says that the delegate erred as follows:

- "he failed to correctly interpret the contract of employment in place between [Johnson] and [Orbital] at the material time" and specifically with respect to "past standards of practice and the usual criteria used in paying commissions";

- "the delegate erred in law when he failed to recognize that not all commissionable revenue could or would be 'generated directly' by [Johnson] as laid out by definition in the commission agreement" and that the delegate erred "by failing to recognize that [Johnson] in fact *expected* to earn at least a portion of his income…in an *indirect* way" (*italics* in original);

- "the Director erred in law when he failed to find that the terms [of the] Employment Agreement between [Johnson] and [Orbital] dated April 1, 2002 had been modified by the parties by agreement, on August 30, 2002 when the accountant agreed to pay commissions for deals completed or collected by others during [Johnson's] disability leave and upon his return to work";

- "The delegate erred in law when he…failed to recognize the special relationship and commission arrangement laid out in the contract with respect to splitting the commission with the account manager—specifically the fact that the account manager regularly did the work that [Johnson] routinely received commissions as a direct result of that work (an override)";

- "The Delegate's determination that no Vacation Pay is owed to [Johnson] because no additional evidence was provided by [Johnson] was a patently unreasonable finding of fact";

- "...the Director erred in law when he failed to properly interpret the 2% bonus calculation, the exchange rate used, and by overlooking the much larger fact that payment of the bonus o the support renewals by the Employer indicates admission that the base commission payment for these renewals would be due, which they disputed."

- making a patently unreasonable finding of fact with respect to a series of e-mail communications which were marked as Exhibit 6 in the hearing before the delegate;

- "...the Director erred in law when he failed to acknowledge or include in his Determination the critical importance of a <u>fourth</u> criteria for payment of commissions in the contract that included the words 'and subsequently collected by the company'...In other words, [Johnson] would be credited for work done but not yet completed--i.e. invoiced, paid, etc. in the event of absence or termination...The <u>fourth</u> criteria would clearly support payments of the commission amounts--even after termination--which are overlooked in the Delegates [sic] findings";

- "The Delegate's determination that no commissions were owing to [Johnson] between September 19, 2002, and March 18, 2003, was a patently unreasonable finding of fact."

FINDINGS AND ANALYSIS

At the outset, it should be noted that this appeal largely turns on the correct interpretation to be given to the parties' written employment contract and, more particularly, the compensation provisions contained therein. I propose to address the commission claim and the vacation pay claim separately.

Payment of Commissions

As noted above, Johnson was employed by Orbital as a salesperson from May 1st, 2001 until March 18th, 2003. The scope of the Determination is limited to any unpaid wage liability that might have crystallized during the period September 19th, 2002 until March 18th, 2003 [see subsection 80(1)(a) of the *Act*].

Johnson's employment with Orbital was governed by a written contract of employment, of indefinite term (though containing express termination provisions), and entered into as of April 1st, 2002 (the "employment agreement"). Johnson's compensation entitlement was set out in Appendix A ("Compensation") to the employment agreement. Among other things, the employment agreement provided for an annual salary of $100,000 plus a "commission scheme" that was stated to be in effect from April 1st to December 31st, 2002.

By way of a letter dated January 20th, 2003, Orbital advised Johnson that the commission scheme expired as of December 31st, 2003 and "confirm[ed] our agreement that the commission agreement will continue in effect for the period commencing January 1, 2003 and ending the earlier of March 31, 2003, and the date the parties enter into another commission agreement".

In large measure, Mr. Johnson's appeal is predicated on the assertion that the commission scheme was modified by subsequent dealings between the parties. There are two points to be made regarding this latter assertion. First, the evidence is not at all clear that such discussions resulted in a concluded agreement to modify the terms of the written agreement. Second, such evidence amounts to parol evidence that seeks to modify, vary or contradict the express terms of the written agreement and, accordingly, is inadmissible (see also paragraph 8.6 of the employment agreement).

I now turn to the terms of the parties' written agreement.

Commissions fall within the section 1 statutory definition of "wages", however, whether an individual is entitled to a commission depends upon the language of their employment contract; in other words, when and under what circumstances is a commission *payable*? Employers and employees are lawfully entitled to arrange their affairs so that commissions are contingent on various preconditions, including continuing service, so long as the conditions in place do not offend the provisions of the *Act.*

The employment agreement contains the following provisions regarding the payment of commissions:

> If the Employee fulfils all of his obligations under this Agreement, as full consideration for all services rendered or to be rendered, Orbital will pay the Employee...
>
> (b) a commission scheme as follows with the percentage of gross revenues as indicated generated directly by the Employee and invoiced commencing from April 1, 2002 and continuing till last day worked and subsequently collect by the company -- as stated:

> (a) The commission is to be split between Employee and all others involved in the generation of revenue, including account manager, as decided by Employee and agreed in advance by Executive Management
>
> (b) This commission agreement is for the period of April 1st to December 31st, 2002.
>
> (c) 5% on royalties from currently identified royalty customers (see attached listing)
>
> (d) 5% on support payments by renewing support customers. This increases to 7% if 90% or more of the customers, based on revenues, renew support -- the additional amount to be paid after the 90% point is reached for the year and after all payments are received
>
> (e) 7.5% on royalties from previous customers who were not known to have royalty agreements (see attached listing)
>
> (f) 10% on support payments from previous customers who had left support for a period greater than 1 year and who have been brought back to support
>
> (g) 10% on any new consulting/service work done for existing customers [Note: there is an initialed handwritten note after this paragraph that states: "inc. new platform"]
>
> (h) 10% on any new ODBC licensing or customized solutions (new customers)
>
> (i) 15% of the net amount on collection of bad debt in which the Employee has handled the collection process
>
> (j) 20% of any monies found owing from previous customers with whom the company has not had contact for the past 1.5 years (not to be combined with e) above) -- list [sic]
>
> (c) commissions will be paid within 30 days of receipt of payment from customer,...

The delegate held, at page 7 of his reasons, that:

> Upon my review of the commission agreement, the commissions in dispute would become payable as wages, when they were:
>
> 1) generated by [Johnson] and
>
> 2) invoiced to the customer and
>
> 3) were payable, while [Johnson] was in the employ of the employer, "until the last day worked".
>
> The above criteria are all jointly required and do not on their own result in an obligation on the part of the employer to pay a commission. Given that all three criteria had not been met at the time of [Johnson's] termination, the employer is not liable to pay those commissions in question by [Johnson].

I am unable to conclude that the delegate erred in his interpretation of the commission scheme except to note that not only must the work have been invoiced by Orbital to its customer but, in addition, the invoice must have been "collected" by Orbital as a condition precedent to payment to Johnson [recall section (c) of the compensation scheme, above, states that commissions will be paid "within 30 days of receipt of payment from customer"; see also paragraph (b)(i) which refers to a commission being paid on a recovered "bad debt"].

The agreement clearly states that commissionable gross revenues must be "directly" generated by Johnson. Thus, Johnson's assertion that he is entitled to share in commissions that were generated by other Orbital employees is, in my view, not tenable in light of the specific language of the commission

scheme. I would consider a commission to be "directly" generated when the employee in question is the principal client contact and is primarily or substantially responsible for the particular commissionable source of revenue (be it a licence agreement, support payment, royalty etc.).

Johnson was on disability leave (and received disability benefits under a third party insurance plan) during the period from August 31st, 2002 and January 3rd, 2003. He claims commissions for work generated (by other employees) during this latter period. Before he went on disability leave, Johnson prepared a note itemizing work that could be done by way of follow-up during his absence (see Record, Exhibit 2). Orbital concedes that sales were generated and invoiced during Johnson's disability leave but also says that this work was generated through the efforts of other employees. Counsel for Orbital submits that the sales in question were not directly generated by Johnson and, in any event, he was not "working" during his disability leave. The delegate accepted counsel's submission and I see no error in that regard.

An employee on disability leave may well continue to be an "employee" for purposes of the *Act.* However, "wages" (including commissions) are payable for "work" and unless an employee on leave is providing "labour or services for an employer" during their leave [or is otherwise "on call" within subsection (2) of the definition], that person cannot be said to be "working" for purposes of the *Act.* The commission scheme agreed to by the parties did not contravene the *Act* and it provided for a commission only in regard to those revenues "directly" generated by Johnson through his "work" efforts. Neither criterion could apply while Johnson was absent due to his disability leave.

Notwithstanding the foregoing, Johnson asserts that he was paid commissions even though such commissions might not have been payable under the parties' written commission scheme. Without commenting on the correctness of that assertion, I can only say that if such *ex gratia* payments were made (and the evidence on this point is far from clear), that circumstance cannot override the express and clear terms of the parties' written agreement and, thereby, create a new contractual obligation on the part of Orbital (among other things, such an alleged "new" contract would fail for want of consideration).

The employment agreement was made as of April 1st, 2002. Mr. Johnson purports to rely on a series of e-mail communications that predated the employment agreement in order to vary or otherwise explain the terms of the employment agreement. These e-mails (Record, Exhibit 6), however, have little or no probative value. The employment agreement, by way of paragraph 8.6, specifically excludes precontractual representations and, having reviewed the e-mails, I cannot conclude that they, in any event, evidence a concluded agreement with respect to the payment of commissions.

Vacation Pay

Mr. Johnson claimed $4,519.17 in unpaid vacation pay (Record, Exhibit 16). However, my calculations indicate that his vacation pay claim should be for $4,540.19. The delegate reviewed Mr. Johnson's T-4 record of earnings for the years 2001 and 2002 (Record, Exhibit 17) and concluded that he had, in fact, been "overpaid" by $11.65 on account of vacation pay. Regrettably, the delegate's calculations are not set out anywhere in the reasons or in an accompanying appendix or table.

Mr. Johnson asserts that the delegate's calculation is incorrect. Counsel for Orbital merely says that Mr. Johnson's claim for additional vacation pay "is an attempt to overturn an express finding of fact". However, I do not consider this particular issue to be a pure factual question. The interpretation of the parties' vacation pay agreement is a matter of law and if the delegate incorrectly calculated Mr. Johnson's

vacation pay entitlement, that error, at the very least, is one of mixed fact and law. Either way, that sort of error is reviewable on appeal to this Tribunal.

Given that the delegate correctly determined that the relevant period for calculating Mr. Johnson's unpaid wage claim was the last six months of his employment, upon the termination of his employment Mr. Johnson was entitled to any vacation pay that became payable during this latter 6-month period [see subsections 58(3) and 80(1)]. That being so, it is not clear to me why the delegate referenced 2001 earnings as evidenced by Johnson's T-4 for that year.

I note that Mr. Johnson had earnings in 2003 that, presumably, would have attracted vacation pay; the delegate's reasons do not refer to Johnson's 2003 income. I am wholly unable to determine from the delegate's cursory reasons, or from the record, or counsel's submission, or Mr. Johnson's material, whether or not Mr. Johnson's entitlement to vacation pay has been correctly determined. The delegate has a legal obligation to provide reasons that adequately explain the basis for making an order for payment of wages or, as in this case, for refusing to make a payment order. The failure to give adequate reasons may be characterized as an error of law or a failure to abide by the principles of natural justice. Accordingly, I am referring the matter of Mr. Johnson's vacation pay entitlement back to the Director so that proper reasons (and, if appropriate, a calculation schedule) may be issued on this aspect of Mr. Johnson's claim.

After these latter reasons have been issued, the parties shall be given an opportunity to make submissions with respect to the correctness of the delegate's reasons and/or calculations and the Tribunal will then make a final ruling on this aspect of the appeal.

ORDER

Pursuant to section 115(1)(b) of the *Act,* I order that the matter of Mr. Johnson's vacation pay entitlement be referred back to the Director so that proper reasons may be issued on this aspect of Mr. Johnson's claim. Pursuant to section 115(1)(a) of the *Act,* I order that in all other respects the Determination be confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal