

An appeal

- by -

Robert E. Strain
(the "Employee")

- 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.: 2000/739

DATE OF HEARING: February 20, 2001

DATE OF DECISION: March 22, 2001

DECISION

APPEARANCES:

Mr. Robert E. Strain on behalf of himself

Mr. Bill Lande on behalf of the Employer, Olympic Boat Centers Canada Ltd.

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 October 3, 2000. The Determination concluded that Strain was not owed any money by the Employer on account of overtime wages and commissions.

The background facts--it appears from testimony at the hearing by Lande and Strain--are largely not in dispute as between the parties. The Employer operates as boat sales business in British Columbia and has operations in the United States as well. Strain worked as a store manager for the Employer in Port Moody between April 1996 and January 15, 1999. At that time, he resigned, giving three weeks’ notice. The Employer elected to terminate his employment rather than accept Strain’s working notice and paid three weeks’ severance pay.

Following his termination, Strain filed a complaint with the Employment Standards Branch, alleging that the Employer had failed to pay him all wages owing. The issues before the delegate was whether Strain was entitled to overtime wages, or, in the alternative, pay over and above his salary for hours worked in excess of 40 hours in a week, and whether he was entitled to commission payments as a result of the sale of a boat. The delegate resolved these issues in favour of the Employer. There being no dispute that Strain was a manager, the delegate found that he was not entitled to overtime wages. He also found that the manager’s compensation plan contemplated that Strain would work the hours “needed” to do the work. Finally, the delegate was of the view that Strain was not entitled to the commission because the Employer’s policy stated that commissions are not payable where sales are completed after the salesperson has left the company.

ISSUES

1. Is Strain entitled to overtime wages or compensation for hours in excess of 40 in a week?
2. Is Strain entitled to the commission for the sale of a boat?

FACTS AND ANALYSIS

As noted, the Employee appeals the determination. The Employee, as the appellant, has the burden to persuade me that the Determination is wrong.

In large measure, the issues on appeal are of a legal nature and turn on the proper interpretation of the employment contact between the parties in the context of the requirements of the *Act*.

I turn first to the issue of “overtime wages”--either founded on the statute rate or on the employment contract. There was no dispute at the hearing, nor indeed before the delegate, that Strain was a manager. In the result, I agree entirely with the delegate’s conclusion that Strain was not entitled to overtime wages under the statute. Part 4 of the *Act* (hours of work and overtime) does not apply to a manager (see *Employment Standards Regulation* 34(1)(f)). Strain did not pursue this argument at the hearing. Rather he argued that he was entitled to pay at straight time for the hours worked in excess of 40 in a week. The entitlement must, in my opinion, be founded on the employee’s contract of employment. In my opinion, the onus of establishing an entitlement rests on the person claiming it. In the absence of a written or verbal employment contract, which provides for the entitlement, at the time of hire, the employee must show that the contract has somehow been modified over time to include the entitlement. In the instant case, Strain conceded that there was nothing in the contract of employment that limited the hours of work to 40 hours per week. He explained that when he was hired as a manager he was told that he would have Sundays and Mondays off. He explained that he on occasion worked on those days. The Employer agreed that Strain would normally have those days off. However, he also explained that in return for the store manager’s compensation package of a salary of \$4,500 monthly plus a number of different bonuses (and commissions on his own sales), in charge of the sales, service and parts department, Strain would be expected to come in and take care of problems as they arose. As well, as store manager, Strain had some flexibility in setting his own hours, for example to take time off or leave early. The delegate correctly considered whether there was a contractual basis for the entitlement to overtime pay. He found, correctly, in my view, that there was no agreement between Strain and the Employer to the effect that the former’s compensation was based on a 40 hour work week, such that work in excess of those hours would entitle him to additional pay. In my opinion, the evidence does not establish a contractual entitlement to be paid overtime, at straight time.

The second issue--entitlement to a commission--is more intriguing. There is little dispute with respect to the material facts. As mentioned above, Strain quit on or about January 15, 1999. The Employer elected to pay three weeks’ severance pay rather than him work out his notice period. For some time prior to his termination, from about October and November 1999, Strain had been working on the sale of a 47’ yacht to a Mr. Cryer. He had met with the customer and his wife and showed the boat. As well, he had settled the pricing, the pricing for the trade-in (a 40’ boat) and the transport and delivery of the boat to Lake Tahoe in the United States. Up until the time he left the Employer’s employ, no-one else had been involved in the sale and, in fact, he remained in contact with the customer after he left Olympic. Apparently, Strain and the

customer was waiting for the boat show in Seattle to finalize the deal--at that time, Olympic offers special pricing. It was not uncommon for salespersons to “build up” customers for that event (and the similar show in Vancouver). When he left Strain contacted the customer and let him know that another salesperson, a Bill Steele, would be taking over. Strain claims an entitlement to half of the commission for the \$575,000 boat (Cdn)--and claims \$2,270 in that regard. He says that there was an agreement between him and Steele, approved by Olympic’s management, that he would be paid half of the commission on the boat. I note that the Employer disagrees that it approved any arrangement between the two.

In the main, however, the Employer does not dispute most of Strain’s assertions. Lande agreed that Strain “worked with Cryer” and there does not seem to be a dispute that Strain did most of the work with respect to the sale. Lande says that the agreement to purchase the boat was not made until January 26, 2000, *i.e.*, after Strain’s termination, and was not finally approved by management until February 28, 2000. On January 26, 2000, the Employer received the deposit for the sale--\$10,001.00--at which time, according to Lande, in the usual and ordinary course of events Strain’s entitlement to a commission would have crystalized for payment when the boat was delivered to the customer and payment received by Olympic. In short, in my view, had Strain continued to be employed during the statutory notice period, his entitlement to the commission would likely have crystalized for payment upon the completion of the sale.

I accept Strain’s testimony that he did most of the work on the sale. In my view, the slight differences between the January 26 and the February 28 sales agreements bear this out. I do not give any weight to a letter, written by Steele, and submitted by the Employer, that there was an agreement (not involving Olympic’s approval) between Steele and Strain that the latter would be paid \$250 for the Cryer boat sale, which was not paid because of his “personal decision based on some statements and actions which Mr. Strain has instigated.” Steele did not testify at the hearing and was, therefore, not subject to cross examination. In the circumstances, I do not consider this evidence reliable. I note that, in any event, even his letter does not dispute that Strain did most of the work involved with the Cryer sale. A letter by a member of Olympic’s management to the effect that the Employer was not involved in the agreement between Steele and Strain does not dispute Strain’s assertions with respect to his involvement in the sale. I accept, as well, that there was an agreement between Steele and Strain that the former split the commission such that Strain was paid \$400 by Steele for another boat sale. Strain testified that there was such an agreement. He explained that the circumstances were different from the Cryer sale because the customer ended up purchasing a different boat from the one he had showed. In the Cryer sale, Strain said he had done all the work except “taking the deposit.”

Strain’s compensation plan included, as mentioned, three main components: a \$4,500 monthly salary plus a variety of monthly, quarterly and annual bonuses based on profitability and performance. In addition, Strain was also entitled to a commission on boats sold by him. Aside from the issue of entitlement to pay for work in excess of 40 hours in a week, the salary and the bonuses were not in issue at the hearing. The store manager’s pay plan was attached to the Determination and, with respect to bonuses, included the following:

“The manager must have been an Olympic Boat Centers manager for the full year, exhibited on time performance for all assignments and deadlines, and be employed by Olympic Boat Centers at the time of any bonus payment to receive the full bonus amount. If the preceding is not satisfactory, then the bonus amount shall be at the discretion of Olympic Boat Centers general management.”
[emphasis in original]

With respect to commission for sales, there was what appears to be a separate document, entitled “sales compensation plan, Canada, 9/1/98 through 8/31/99” and another document for the period through to “8/31/00.” These documents were attached to the Determination. There is a question in my mind as to whether the latter was actually in place at the time of Strain’s termination and any differences between the two--and these aspects were not pursued at the hearing. I have some difficulty with the concept that an employer can unilaterally change the compensation an employee in a substantial manner without causing a “constructive dismissal.” However, for the present purposes I need not pursue this any further.

In any event, the “compensation plan” provided (in part):

“THIS SALES COMPENSATION PLAN IS NOT A CONTRACT OF EMPLOYMENT AND SHOULD NOT BE CONSTRUED TO FORM A CONTRACT BETWEEN THE COMPANY AND ITS EMPLOYEES

...

Sales commissions will only be paid on legitimate retail sales. Sales to wholesalers (resale certificate) or fleet type business accounts are house deals and don’t qualify for a commission. Sales commissions are earned only when the boat is paid for in full by good check or other funds. Full commission payment requires selling sales person to be present at time of delivery, perform required after sales follow up and maintain a satisfactory personal CSI. Up to 50% of the commission may be deducted, if after a written warning, sales person continues to neglect the above items in violation of company policy. A sales person leaving Olympics employ prior to delivery of a commissionable item, is entitled to no commission for that item. Up to 50% of a regular commission may be paid, at the discretion of the store manager, depending on the amount of time and effort required by another to complete delivery....X_____ (sales person initials)”
[emphasis in original]

Despite the disclaimer--that this is not an employment contract--I have no difficulty deciding that it is just that. It deals with a fundamental term and condition of employment, namely the remuneration an employee is--or may be--entitled to. Under the *Act*, “condition of employment” is defined as “all matters and circumstances that in any way affect the employment relationship of employers and employees” (Section 1). Indeed, and not surprisingly, the Employer in this case, relied on the above to support the argument that Strain was not entitled to the commission

for the sale in question. The Employer says that because Strain's employment terminated prior to the delivery, he is not entitled to the commission.

Subject to the requirements of the *Act*, the normal principles of contract interpretation applies to employment contracts, in particular the principle of *contra proferentem*. This principle holds that ambiguity may be construed against the person who drafted it, often the employer. This principle is applicable in the instant case. The entitlement under the compensation plan to a *full* commission payment appears to require that: (1) the selling sales person to be "present" at time of delivery, (2) perform required after sales follow up and (3) maintain a satisfactory personal CSI. (The meaning of the third criteria was not explained at the hearing and remains unclear to me, but there was no issue that Strain had not performed his duties in anything but a satisfactory manner). The *reduced* commission on a first reading seems to support the Employer's argument, that a salesperson is not entitled to a commission unless the employer in its discretion decides that is so. However, the subsequent wording--"depending on the amount of time and effort required by another to complete delivery"--indicates that the parties contemplated that the Employer's discretion is fettered. That is supported by the evidence presented at the hearing. I accept the Employer's evidence that on January 26, 2000, when the Employer received the deposit for the sale--\$10,001.00--at which time, in the usual and ordinary course of events Strain's entitlement to a commission would have crystalized for payment when the boat was delivered to the customer and payment received by Olympic. While the compensation plan--"Sales commissions are *earned* only when the boat is paid for in full by good check or other funds"--appears to contemplate that commissions are "earned," as opposed to "payable," at the time of the completion of the sale, the Employer's own evidence suggests the opposite, namely that commissions are earned when the deposit is taken and, assuming that the sale is completed, payable at that time.

I appreciate that the parties were not represented by counsel and this legal point was not fully argued before me. All the same, the decision, that Strain is entitled to the commission in the instant case, in my view, is consistent with the jurisprudence. In *Hawkins v. Mack Maritime Distributors Ltd.*, the New Brunswick Supreme Court, Appeal Division noted ((1970) 2 N.B.R. 427):

"The main defence was that the plaintiff forfeited all his right to commissions before leaving the employ of the defendant before the completion of the transactions. His contract of employment, which was verbal, contained no provision depriving him of his right to commissions earned but not paid or payable before the termination of his employment. In this context we consider a commission to be earned when a salesman, who has been the effective cause of the sale, has substantially performed his duties in connection with such sale, notwithstanding the time for payment of the commission has not arrived. In both *Wilson v. Atlas Coal Company Limited* [1923] 2 W.W.R. 890, and *Jones v. Beattie Cadillac Chevrolet Oldsmobile Limited*, [1948] O.W.N. 4, the defendants

were held liable although deliveries were not made until after the employment of the salesman had been terminated.”

See also *Rowles v. Al-Wood Manufacturing Ltd.*, [1979] A.J. No. 639 (Alta. Distr. Ct.) and *Saunders v. J. Nash Sportswear Ltd.*, [1993] M.J. No. 114 (Man.QB).

In short, I am of the view that Strain has discharged the burden on the appeal with respect to the issue of the commission.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated October 3, 2000, be varied to reflect that Strain is entitled to commission payments in the amount of \$2,270 and I refer the calculation of the amount of interest back to the Director.

IB S. PETERSEN

Ib S. Petersen
Adjudicator
Employment Standards Tribunal