Employment Standards TRIBUNAL

An appeal

- by -

Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd.
(the “Appellant”)

- 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: W. Grant Sheard

FILE No.: 2003/021

DATE OF DECISION: June 12, 2003

DECISION

APPEARANCES:

Tammy Tugnum	on behalf of the Appellant Employer
Fred Bublitz	on his own behalf
Alan Phillips	on behalf of the Director

OVERVIEW

This is an appeal based on written submissions by Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd. (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a report of the Director of Employment Standards (the "Director") dated April 4, 2003 wherein the Director's Delegate (the "Delegate") found that the complainant was entitled to a bonus as regular wages plus vacation pay and interest on those wages for a total due of $1,406.93.

ISSUE

Were regular wages (bonus for a commission sales person) due?

ARGUMENT

The Appellant's Position

In a written submission dated April 30, 2003 the Appellant acknowledges that the Respondent had met the criteria to qualify for a bonus. However, the Appellant takes the position that the Respondent was not entitled for bonuses relating to two sales (the "Prowler deal" and the "Christianson deal") asserting that the Respondent had verbally agreed with the Appellant to set aside or waive the bonuses which would otherwise have been payable on these transactions. The Appellant says that, although there are no records to indicate this verbal agreement, the Respondent had adhered to similar verbal agreements to waive other bonuses on other transactions. The Appellant also notes that, following the original Decision on this appeal, after the matter was referred back to the Delegate, the Delegate wrote to the Appellant saying that the Respondent "does not wish to pursue the issue of commissions owed to him". The Appellant says that, in view of this, it does not understand how the Respondent can now be pursuing the commission (bonus) once again.

The Respondent's Position

In a written submission dated May 15, 2003 the Respondent asserts that the Appellant informed him that, if he did not make the Prowler deal and the Christianson deal with no bonus paid he would be fired. He maintains his assertion from the investigation prior to the referral back of this matter to the Director that he did not agree to waive the bonuses for these two transactions.

The Respondent says that when he earlier agreed to waive payment of the bonus or commission due it was on the basis that he would be paid the full amount of the original Determination regarding compensation for length of service in the sum of $12,056.16. When he later agreed to accept the Employer's reduced figure for this item of $7,197.65 he did so on the basis that his bonus would be payable afterall.

The Director's Position

In a report of the Director of Employment Standards of a matter referred back dated April 4, 2003 the Delegate noted that, following the original appeal Decision made in this matter August 20, 2002 on the issues of compensation for length of service and whether the bonus was payable, the issue of the bonus was referred back to the Delegate to investigate further. In a letter dated August 26, 2002 faxed to the Appellant the Delegate informed the Appellant of the Respondent's position that, with the total amount owed for the compensation for length of service of $12,056.16, the Respondent did not wish to pursue the issue of bonus or commission owed to him assuming that he would receive the full amount of compensation for length of service of $11,000.00 plus vacation pay and interest totaling $12,056.16. Following that correspondence, on August 28, 2002 the Appellant telephoned the Delegate and insisted that, based on their records, the compensation for length of service entitlement was only $7,197.65. On that same day the Delegate discussed this figure with the Respondent who agreed to accept that reduced amount (plus interest thereon) for compensation for length of service provided that the commission or bonus to which he was entitled was paid afterall. The Delegate advised the Appellant of this in a fax dated August 30, 2002. As a result of that fax the Appellant sent a cheque to the Branch for the Respondent in the amount of $7,445.62. The matter of the commission or bonus was, therefore, left unresolved.

In his report, the Delegate found that the respondent had met the sales target necessary to qualify for the bonus with respect to the two transactions in issue.

The Delegate went on to find that, "There is no evidence that the complainant agreed to waive his entitlement to the bonus for these two sales. On a previous deal involving the sale of a vehicle to his wife, the complainant did agree to waive his entitlement to a bonus. There is no evidence that the quick start bonus program (see attached, 1 pp) had any conditions attached, other than those identified above. For example, there is no evidence that a deal which resulted in very little profit for the employer was to be exempt from the bonus program. The fact is, the complainant did complete both deals. There is no evidence that the complainant agreed that the deals did not qualify for the bonus." The Delegate found that the Respondent was therefore entitled to the bonus as regular wages with vacation pay and interest on those wages for a total due of $1,406.93.

THE FACTS

This Decision is supplemental to a Decision originally made involving these parties August 20, 2002 under file no. BC EST # D378/02.

The Appellant is an automobile dealership. The Respondent worked for the Appellant from March 2, 1992 to October 19, 2001 as a sales consultant on a commission basis. The Employer terminated the Respondent's employment. The Respondent filed a complaint claiming he was owed regular wages (bonus) and compensation for length of service.

On May 3, 2002 the Delegate investigating the complaint sent the Employer a preliminary findings letter indicating that the complainant did appear to be entitled to compensation for length of service and regular wages (bonus) as he alleged. The Employer was advised that, unless it presented further evidence to the contrary by a deadline of May 8, 2002, a Determination would be issued accordingly.

The Delegate did not receive a response from the Employer by May 8, 2002 and, in the result, on May 22, 2002 issued the Determination now appealed from ordering the Appellant to pay 8 weeks compensation for length of service, regular wages (bonus due), vacation pay and interest for a total due of $13,317.45.

In that original Decision I allowed new evidence submitted by the Appellant on the issue of just cause, but upheld the Delegate's finding that just cause was not established and compensation for length of service was due. With respect to the issue of wages (bonus) due, the Appellant had asserted in the written submissions on the original appeal that the Respondent had agreed to waive the bonus that would otherwise have been payable on two transactions. The Respondent had not replied to that assertion in his material and, therefore, I referred the matter back to the Director for further investigation regarding this issue.

In the further submissions made to the Delegate and on this further appeal the Appellant says that the Respondent verbally agreed to set aside the bonus on these two transactions, but acknowledges there are no records to indicate the verbal agreement. However, the Appellant says that the Respondent also verbally agreed to waive the bonuses on other transactions which agreements the Respondent has adhered to.

In further submissions made to the Delegate and in writing on this appeal the Respondent says that with respect to the two transactions in issue (the Prowler deal and the Christianson deal) the Appellant told him "Do the deal and no bonus or I will fire you".

The original Decision required the Appellant to pay the Respondent $12,056.16 for compensation for length of service and vacation pay and interest thereon. Following the original appeal Decision herein on August 20, 2002 and referral back to the Delegate on the issue of the bonus, on August 26, 2002 the Delegate faxed the Appellant advising it that the Respondent had now communicated that he would waive the commission payable if he was paid the full amount of compensation for length of service and accrued interest then in the sum of $12,056.16. On August 28, 2002 the Delegate spoke with the Appellant on the phone when the Appellant insisted that, based on their payroll records, the correct amount of compensation for length of service was $7,197.65. On that same day the Delegate spoke with the Respondent who agreed to accept the Appellant's reduced figure for compensation for length of service, but then required the bonus/commission to be paid as well. On August 30, 2002 the Delegate faxed the Appellant advising that the Respondent was then entitled to $7,445.62 for compensation for length of service with further accrued interest and the Appellant then sent the cheque to the Branch payable in that amount for the Respondent. The matter of commissions or bonus was left unresolved.

In a report of the Director of Employment Standards of a matter referred back dated April 4, 2003 the Delegate reviewed the information provided and submissions made by the parties and found that, as there was no evidence that the complainant agreed to waive his entitlement to the bonus for these two sales, the bonus was payable with vacation pay and interest for a total due of $1,406.93.

ANALYSIS

In Section 1 of the *Act* "Wages" are defined to include:

a) "salaries, commissions or money, paid or payable by an employer to an employee for work;

b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency….."

Section 18 of the *Act* provides as follows:

> Section 18(1) an employer must pay all wages owing to an employee within 48 hours after an employer terminates the employment.

The onus is on the Appellant to establish on a balance of probabilities an error in the finding of the Delegate.

In the oral representations made to the Delegate and in the written submissions made on this appeal there is a conflict between the evidence of the Appellant and the Respondent with respect to an agreement regarding bonuses payable. While there is no requirement that such an agreement be in writing, from an evidentiary standpoint it is obviously easier for an employer to prove such an agreement if it has been reduced to writing. While I disagree with the Delegate's statement that "there is no evidence that the complainant agreed to waive his entitlement to the bonus for these two sales", it is clear that there is no written evidence of such an agreement. There is only the Appellant's assertion of this verbal agreement which is denied by the Respondent. Based on the evidence before the Delegate he clearly preferred the evidence of the Respondent on this point. I can find nothing in the evidence which suggests he erred in doing so. Further oral evidence on the point would not assist.

Regarding the Appellant's assertion that it cannot understand how the Respondent is continuing to pursue the commission or bonus payable, this has clearly been explained by the Respondent and the Delegate. Following the initial appeal Decision in this matter the Respondent agreed to waive the bonus provided that the full amount of compensation for length of service in the original Determination and appeal of that Determination were paid. When the Respondent subsequently agreed to take the reduced figure for compensation for length of service proposed by the Appellant, this reduced amount was accepted on the basis the bonus or commission would be payable afterall.

ORDER

Pursuant to section 115 of the *Act*, I order that the report of the Director of Employment Standards of a matter referred back, dated April 4, 2003 and filed under number 43-963, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal