

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 -

Jody A. Findlay
("Findlay")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 98/46

DATE OF HEARING: April 15, 1998

DATE OF DECISION: May 11, 1998

DECISION

APPEARANCES

Jody A. Findlay	The Appellant
John Saleski	Danka Business Systems Ltd.
Rob Lewis	Danka Business Systems Ltd.

OVERVIEW

This appeal is by Jody A. Findlay (“Findlay”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) and it is against a Determination by a delegate of the Director of Employment Standards (the “Director”) which is dated January 12, 1998. The Determination is that Danka Business Systems Ltd (“Danka”) has paid Findlay in full for his work.

This appeal has proceeded in two stages. It began with an oral hearing on April 15, 1998. That hearing was adjourned so that Danka could develop its response to Findlay’s submission on the amount of commissions. Danka had arrived unprepared and had left vital information in its office. From the adjournment on, the appeal proceeded by way of written submissions.

ISSUES TO BE DECIDED

Findlay claims that he has not been paid commissions for three of his sales. Danka now accepts that Findlay is owed commission for one sale but says that is the extent of it.

The amount of commissions is in dispute.

FACTS

Findlay worked as a salesman for Danka from November 1, 1995 to December 14, 1996.

Compensation is governed by a “Compensation Plan” dated November 2, 1995. It provides for a standard commission which is 25% of gross profit. Beyond that there are fees and bonuses. The plan provides for a monthly bonus, a quarterly bonus, a service placement bonus and a supply agreement bonus.

The plan covers “split sales”, defined as sales “originated in one territory or location and installed in another”. The section on split sales goes on to provide that, “in the event of any dispute over credit for a particular transaction within a region, the decision of the Regional Director is final and binding” (my emphasis). In the case of split sales of

standard machines, commissions are to be divided with 75 percent of the commission going to the “Originator” and the remainder going to the “Installer”. However, as matters are presented to me by Danka, and Findlay does not disagree, the section on split sales is not governing where both sale and installation are within the domain of a particular Danka office, the Greater Vancouver office included.

In regard to what is owed, where the sale takes place in one sales territory of Greater Vancouver but is installed in an adjoining sales territory of the city, Danka says that no commission is to be paid to the salesperson that made the sale. Danka says that in such cases the seller is guilty of “poaching”. Poaching is defined in the compensation plan as follows:

“Commissions on sales made knowingly or unknowingly by the incumbent outside his/her assigned territory will be debited against sales credit and commission or bonuses paid to the incumbent, and will be properly credited to the sales person in whose territory the sale was made. Sales in unassigned territories must be expressly permitted by the immediate supervisor. Poaching is not permitted”

Commissions on three sales are in dispute. Findlay sold a Sharp SF-2014 photocopier to the Pitt Meadows Fire Department (“the fire department”). Findlay was denied commission for this sale because it is outside of his territory but on appeal Danka accepts that the sale was in fact authorised by the sales manager. That he is owed commission for this sale is no longer in dispute for that reason. The amount of the commission is in dispute.

Findlay sold a reconditioned Sharp 2035 photocopier, loaded with features, to Race Face Components Inc. (“Race Face”). The sales order for that sale shows Race Face as having an Annacis Island address. According to Danka, Race Face is in New Westminister: It is a related company, Rocky Mountain Bicycles, that has the office on Annacis Island. The photocopier was delivered to Race Face at a New Westminister address. New Westminister is not in what was Findlay’s sales territory. Annacis Island is within what was Findlay’s territory. Danka claims that Findlay is guilty of poaching. Findlay says that he made the sale within his territory and as such he should be paid for it.

Twin Pak Inc. (“Twin Pak”) bought a model 5500 plain paper fax machine from Danka. I am shown a sales order which gives December 17, 1996 as the date of the sale. Findlay had left Danka at that point. Findlay accepts that he is not entitled to commissions for sales that closed after he left Danka but claims to have made the sale to Twin Pak sometime in November. He says that the December 17 sales order is not the original sales order but a second sales order is not produced, nor does he in some other way prove that he made the sale to Twin Pak in November. Danka says there was no deal until the 17th because Twin Pak needed assurance of the machine’s future value and that was not given until the 17th. The December 17 sales order has on it the words, “The above mentioned equipment should be worth at least 20% of the purchase price in 3 years”.

ANALYSIS

I find that, beyond commission for selling the photocopier to the fire department, Findlay is owed commission for his sale to Race Face. Some part of the business entity that is or includes Race Face is at the Annacis Island address shown on the sales order. There is nothing to indicate that the sale was made somewhere other than at the Annacis Island address and that leads me to conclude that the sale was in fact on Annacis Island. The unit was later shipped to New Westminster but that does not move the point of sale, nor does it make Findlay guilty of poaching. As poaching is defined in the compensation plan, it very clearly matters not where the delivery is made but only “in whose territory the sale was made”. Annacis Island is in Findlay’s territory.

In regard to the sale to Twin Pak, it is clear to me that Findlay did most of the ‘leg-work’ on the sale and set the stage for it. He is, however, able to offer nothing that proves that it was he who made the sale. Indeed, the evidence is to the contrary. It indicates that the sale was by someone else on December 17, 1996. As such I conclude that the sale was in fact on that day and that Findlay is not owed commission for the Twin Pak sale.

REMAINING ISSUES TO BE DECIDED

At issue is the amount of commission for the sale to the fire department.

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Positions on the Sale to the Fire Department

One would think that the calculation of commissions would be a relatively cut and dried matter but there is in this case not only disagreement between employer and complainant, the parties change their minds. While it initially said that \$87.92 was owed for the sale, Danka’s final submission is that \$33.28 is owed. Findlay moves from saying commission is the neighbourhood of 10 percent of selling price, \$146, to a figure of \$188.28. He accepts that \$33.28 is owed as standard commission but claims that he is also owed a service placement bonus which he estimates to be \$150.

Positions on the Sale to Race Face

Danka calculates commission at \$443.75. In doing that it calculates sales cost by adding a \$500 clean-up fee. Findlay says that no clean-up fee was charged against the Race Face copier but he accepts Danka’s calculation of standard commission in all other respects. As he calculates standard commission, the sales cost is not \$3,850, as Danka says it is, but \$3,350 for standard commission of \$568.75. To that he again adds a service placement bonus of \$150 for a total of \$718.75 in commissions.

FACTS

Findlay is entitled to the entire amount of standard commission on a sale and whatever bonus commissions are due. Standard commission is 25% of gross profit. Gross profit is the difference between selling price and "sales cost".

Sales cost figures are presented by Danka and are in the form of price sheets. Included are price lists for the photocopiers and also the fax machine sold to Twin Pak. The latter price sheet is for 1997. It was clear to all that the relevant period is November, 1996.

The compensation plan sets out that service placement bonuses are paid where the client enters into a service agreement. The bonuses may be \$0.00, 2 percent, 3 percent, 5 percent or even more, it all depends on the type and length of agreement. I am shown no service contracts or anything else which indicates the amount of bonus commissions that is owed, if any.

ANALYSIS

There is agreement that standard commission on sale to the fire department is \$33.28, and agreement that at least \$443.75 is owed for the Race Face sale. Is that the extent of what is owed Findlay?

Neither Findlay, nor Danka demonstrate that they know the true amount of commissions. In Findlay's case, I am satisfied that that reflects nothing more than a lack of records, records that he is not expected to keep. But Danka has records and yet it calculates that \$87.92 is owed as commission for the fire department sale and then it, without explanation, lowers that to \$33.28. It then charges \$500 clean-up against the Race Face copier without explanation, nor anything establishing the veracity of the deduction. And it also submits a price sheet for 1977 when it is one for 1996 that was required. I find all that rather troubling.

Beyond the above, I find that Findlay demonstrates a clearly superior grasp of matters. Findlay said that he had permission to sell to the fire department. Danka said that he did not but then admits, months later, that indeed he did have permission. Findlay claimed commission for the Race Face sale. Danka responded by claiming that he was poaching. However, as matters are presented to me, it is clear that, if it had paid some attention to the facts and the plain wording of its compensation plan, it would have immediately realised that he was entitled to be paid for the sale. When I combine that with the troubles that I have with its calculations, I find that Danka lacks credibility.

No evidence to the contrary, I find that a clean-up fee was not charged against the Race Face copier. It follows that Findlay is owed standard commission of \$568.75 for his sale to Race Face.

The *Act* entitles employees to payment for their work at minimum wage or the agreed wage where that is higher than the minimum (sections 16, 17, and 18 of the *Act*). Faced with no proof that work was actually performed (the sale of a service agreement), I am unable to

award wages (service placement commission). In the case of the Race Face sale there is nothing indicating the existence of a service agreement and so I find that no service placement commission should be awarded.

In regard to the fire department sale, Danka calculates total commission first as \$87.92 and then \$33.28. It may be that the first figure includes service placement commission. It may be that the first figure reflects some unseen price sheet. Whatever the reason, I am satisfied that the first figure is closer to the truth of what Findlay is owed and award Findlay that amount.

The total amount of commissions is \$656.67. To that must be added vacation pay of 4 percent. With that the total becomes \$682.94 and to that must be added interest.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated January 12, 1998 be varied. Findlay is owed commissions and vacation pay of \$682.94 and interest pursuant to Section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal