

An appeal

- by -

Mitch Dudoward
("Dudoward" or "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: Paul E. Love

FILE No.: 2003A/045

DATE OF DECISION: June 16, 2003

DECISION

OVERVIEW

This is an appeal by an employee, Mitch Dudoward (“Dudoward” or “Employee”), from a Determination dated December 31, 2002 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“Delegate”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “Act”). Mr. Dudoward was employed by French Creek Boat Sales Ltd. (“French Creek” or “Employer”), and was paid on a commission sales basis. The Employee seeks to appeal the finding that he was not entitled to a commission from the sale of a boat, the MV Teri Christina. At the time of the listing of the vessel for sale, the vessel was owned by two shareholders, Nordstrom Enterprises Ltd. (32 shares) (“Nordstrom”) and Ocean Fisheries Limited (32 shares) (“Ocean Fisheries”). The listing agreement was signed by a former employee of French Creek, not Mr. Dudoward, on June 16, 1999. After the boat had been listed for sale with French Creek, the shares in the boat owned by Nordstrom were traded to Ocean Fisheries in return for shares in another vessel. This was a non-cash transaction between the owners of the shares of the vessel. The share transfer occurred on July 1, 1999, and was registered with the Registrar of Shipping on October 27, 1999. Mr. Dudoward was given the right to list vessels for sale on behalf of Ocean Fisheries, but the evidence did not clearly indicate any “listing commission entitlement”, for the period July 1, 1999 to October 27, 1999.

The Tribunal finds that the Delegate determined correctly that Mr. Dudoward was not the listing agent and did not have any entitlement to a commission. Further, under the terms of the listing agreement, the transfer of shares from one share holder to another did not trigger the payment of any commission to French Creek Boat Sales Ltd., and therefore Mr. Dudoward was not entitled to a commission.

ISSUE

Did the Delegate err in determining that Mr. Dudoward was not entitled to a commission?

FACTS

I decided this case after considering the written submissions of the Employee, Employer, and Delegate of the Director of Employment Standards. I note that this is a case where a hearing was held by the Delegate, and the Delegate has transmitted the written record of the proceeding. At the hearing the Delegate heard from Mitch Dudoward and Randy Grant, on behalf of the Employee, and Darryl Henry on behalf of the Employer. I note Mr. Grant was a former partner in French Creek Boat Sales Ltd., and sold his interest by way of an agreement dated April 15, 2002.

Mr. Dudoward was employed as a commissioned sales person with French Creek Boat Sales Ltd. (“French Creek” or “Employer”). In his complaint to the Employment Standards Branch, Mr. Dudoward claimed a commission arising out of the sale of the Motor Vessel (“MV”) Teri Christina in the amount of \$3,375.00. It appears that the MV Teri Christina was listed for sale with the Employer on June 16, 1999. The Delegate found that the vessel was listed with the Employer by Henry Helin. This factual finding is supported by Exhibit “2”, which is a listing agreement bearing the name of Henry Helin as listing agent. Mr. Helin was no longer working for the Employer, by the date of the filing of Mr. Dudoward’s employment standards complaint. The Delegate found that Mr. Dudoward had the right to new listings received from Ocean Fisheries Limited after January 27, 2000. There was a letter filed at the hearing

dated January 27, 2000 from Ocean Fisheries to French Creek indicating that “Mr. Dudoward was to represent Ocean in purchases and sales done through French Creek Boat Sales”. The Delegate found that Mr. Dudoward was not the listing agent for the MV Teri Christina and was not entitled to a commission for listing that vessel.

The facts are somewhat unusual in this case, as the vessel was owned by Ocean Fisheries Limited and Nordstrom Enterprises Ltd. as a partnership or joint venture. The vessel and the licence were listed for sale by Mr. Nordstrom on June 15, 1999. The agreement was in writing (the “listing agreement”). The commission terms are as follows:

I agree to pay a commission of 7% of the first \$50,000 -5 % on the next \$50,000 & 3 3/4 on the next \$100,000 and 2% thereafter on the price plus applicable G.S.T. (the Commission) with a \$1000 minimum upon (a) binding contract of sale being entered into during the term of this Contract; or (b) upon a binding contract of sale being brought into being at any time after the expiry of this Contract in respect of which the efforts of FCBC were the effective cause: or (c) upon a person being introduced to the Vessel during the term of this Contract who is ready, willing and able to purchase on the said terms or who purchases on other terms from me, whether or not such person is so introduced by FCBS or any other person by they

The listing agreement provided for a commission split 50 % to the Employer, 25 % to the listing salesperson, and 25 % to the selling salesperson. After Mr. Norstrom listed the boat for sale, he apparently traded his shares in the vessel to Ocean Fishing in return for Ocean Fisheries’ shares in another vessel that it also owned with Mr. Norstrom. There was apparently no cash that changed hands. The bill of sale, filed as Exhibit “3” at the hearing before the Delegate, listed the consideration for the transfer of shares as “\$1.00 and other good and valuable consideration”. The bill of sale was dated July 1, 1999. The transcript of registry, signed by the Registrar of Shipping, dated October 27, 1999, discloses that the current owner of the MV Terri Christina is Ocean Fisheries Limited.

The agreement dated June 16, 1999 provided that the appointment of French Creek Boat Sales was “irrevocable by me until [blank] and thereafter revocable by me only by giving FCBS 15 days notice in writing by fax or registered mail.” No notice was ever given to French Creek Boat Sales, by either Nordstrom or Ocean Fishing revoking the appointment of French Creek as an agent for the sale of the MV Teri Christina.

The Delegate heard conflicting evidence from Randy Grant and Darryl Henry on the issue of whether the MV Teri Christina was “taken off” the market. Both Mr. Grant and Mr. Henry were shareholders and involved in the business of French Creek, until Mr. Grant sold his shares to Mr. Henry on or about April 15, 2002. It was common ground that the vessel had been listed for sale, and that the vessel was being used while listed for sale. Mr. Grant was of the view that the vessel was taken off the market, and then in effect sold at a time when Mr. Dudoward was entitled to commissions from sales of boats owned by Ocean Fishing. There was, however, no documentation or oral evidence of the expiration of the listing, the removal of the listing, or re-listing the vessel. Neither party called Mr. Nordstrom or a representative of Ocean Fisheries Limited to give evidence on the issue of whether the MV. Terri Christina was removed from the market. The Delegate found that he was not satisfied that the MV Teri Christina had been taken off the market. The Delegate found that there was no proof that the vessel was “taken off the market” at any time after the listing agreement was signed.

Mr. Dudoward filed a complaint with the Employment Standards Branch claiming commission on the sale of a boat and licence. Before the hearing the parties settled the issue of commission on the licence, and the only issue was commission for the sale of the boat.

At the hearing, the Delegate considered a letter from Ocean Fisheries Limited to Mr. Dudoward of French Creek dated January 27, 2000 which confirmed that Mr. Dudoward was to represent Ocean Fisheries in purchases and sales done through French Creek Boat Sales. The Delegate found that both parties interpreted this letter to apply to “listings” after the date of the letter. The Delegate considered also a letter from Ocean Fisheries Limited dated November 29, 2002 to Mr. Dudoward indicating that French Creek had a mandate to sell vessels on behalf of Ocean Fisheries Limited, and Mr. Dudoward was their agent within French Creek Boat Sales.

After the hearing, but before the issuance of the Determination, Mr. Dudoward contacted the Delegate and advised that he had new evidence, but the Delegate did not re-open the hearing, and advised Mr. Dudoward that he would not accept any new evidence at this time.

The question is whether Mr. Dudoward was entitled to a commission arising from this transaction. The evidence appears to be that French Creek Boat Sales was not paid a commission by Ocean Fisheries in respect of the transaction between Nordstrom and Ocean Fisheries.

Employee’s Argument:

The Employee argues that he was the listing agent. He says that while he was not the original listing agent, the vessel was “taken off the market”, and placed back onto the market at a time when he had the exclusive right to sell vessels on behalf of Ocean Fisheries.

The Employee argues that new evidence became available which was not available at the time the Determination was made. The Employee argues the new evidence confirms that the vessel was taken off the market. The Employee says that this means that the listing agreement signed by Nordstrom was invalid. The Employee argues that the Delegate erred in law in finding a valid listing agreement, and erred in failing to find that he was the listing agent and entitled to a commission.

Employer’s Argument:

The Employer argues in effect that there was “no sale” of the vessel just a sale of shares in the vessel, and the vessel continued to be listed for sale with the Employer, and the Employer continued to market the vessel. The Employer further argues that the listing agent was not Mr. Dudoward, and that Mr. Dudoward did not actively advertise or promote the vessel. The Employer argues that while Mr. Dudoward was the Ocean Fisheries representative for listings received after January 27, 2000, the listing was in June of 1999. The Employer denies that the boat was taken off the market, and in effect re-listed. The Employer says that the boat was “always being fished” while it was listed for sale. The Employer says that it was entitled to a commission on the transfer of shares, but did not collect the commission since the vessel remained listed for sale, at all material times.

Delegate’s Argument:

The Delegate argues that the “new evidence” submitted by Mr. Dudoward, does not meet the test for admissibility of new evidence. He submits that there was no error in law, in determining the original listing was valid, and that Mr. Dudoward was not entitled to a commission.

ANALYSIS

In an appeal, pursuant to the *Act*, the burden rests with the appellant, in this case the Employee, to demonstrate an error in the Determination, such that I should vary or cancel the Determination.

Section 112(1) of the *Act*, sets out the grounds upon which an appellant may file an appeal. These grounds are that:

- (a) the Director erred in law;
- (b) the director failed to observe the principles of natural justice;
- (c) evidence has become available that was not available at the time the determination was made.

The appellant submits that this is a case for new evidence, and that this is also a case where the Delegate erred in law in failing to find an entitlement of Mr. Dudoward to a commission.

New Evidence:

The Employee sought to introduce new evidence in his written submission. The new evidence is a letter written by Ocean Fisheries Limited dated February 4, 2003. The letter details the transaction between the shareholders concerning the MV Teri Christina, the use of the vessel, and the withdrawal of the vessel from the market. In my view, this “new evidence” does not meet the test for admission of new evidence. I have therefore not considered the letter of February 4, 2003 in my consideration of the Employee’s appeal. My reasons for refusing to admit and consider this evidence are set out below.

One of the basic purposes of the *Act*, set out in section 2(a) of the *Act* is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. In my view, this means that there should be timely and efficient resolution of employment disputes. A number of appeal decisions have set out that the time for an appellant to make his or her case, is at the time of the investigation or hearing, before the Delegate. The Tribunal exists primarily to correct errors that were made by the Delegate during the investigation or hearing process. Generally, the failure of a party to advance an issue, evidence or facts before a Delegate, may lead to a result which is unsatisfactory to one of the parties, but that failure is not an error of the Delegate. Different facts can lead to different results in an adjudicative process. There must be some finality to a litigation process, otherwise it would be open to any unhappy party to re-litigate the result of an adverse Determination, by seeking to address fresh evidence after an unfavourable adjudication decision.

The legislature has provided for appeals of Determinations, in section 112 of the *Act*. While the legislature has provided for a “new evidence” grounds of appeal in section 112, the Tribunal must determine whether, in substance, the appeal is simply an attempt by an unhappy litigant to re-litigate the result of an adverse Determination. Many appellant courts or tribunals have provisions for the admissibility of new evidence. Rules of this nature are necessary to balance both the values of a fair, but efficient hearing, and also to promote finality of the adjudication process, recognizing that error correction is the important task or work of an appellate tribunal.

In my view, in order for new evidence to be admissible, the appellant must satisfy the Adjudicator that the evidence is relevant to an issue, the evidence has some weight, and that the evidence could not have, with due diligence, been discovered and presented by the proponent at the earlier hearing or investigation. I am satisfied that the evidence sought to be tendered by Mr. Dudoward is relevant to the issue of

commission entitlement. While I am satisfied the evidence has some weight, in and of itself, the new evidence is not dispositive of the issue of commission entitlement.

I am concerned in this case, that the Employee has not advanced any reason for his failure to have the evidence of Ocean Fisheries Limited available at the hearing before the Delegate. In the submission of the Delegate it is suggested that the principal of Ocean Fisheries was “out of town” at the time this hearing was held. There is no evidence before me of the efforts made by the Employee to secure the attendance of Ocean Fisheries. I note in the letter of Ocean Fisheries dated November 29, 2002, the principal of Ocean Fisheries expresses his willingness to attend a meeting “if his presence was required”. The letter further notes that he was unavailable for a period of time (December 1 -10, 2002), but the hearing was not conducted during that period.

The central issue at the hearing, before the Delegate, was an entitlement of the Employee to a commission based on listing a vessel for sale. The evidence that relating to “listing”, the removal of the vessel from the listing, and the use of the vessel during the listing, would have been evidence from the buyer and the seller. There is nothing “new” about the evidence of the seller, other than it was not advanced by the Employee at the hearing. In my view, this is not new evidence, but rather “old evidence”, which ought to have been advanced before the Delegate.

An appeal is not an opportunity to litigate fresh new issues which ought to have been placed before the Delegate. An appeal is not an opportunity to fill in “evidentiary gaps” which should have been addressed in the investigation or hearing conducted by the Delegate. I therefore decline to admit or consider the new evidence.

Error in Finding no Entitlement to a Commission:

The documents in this case show that the MV Terri Christina was transferred by sale of shares on July 1, 1999, and the transfer appears to have been registered on October 27, 1999. The evidence does not clearly establish when Henry Helin left employment with Ocean Fisheries, but he was the listing agent on June 16, 1999. While Mr. Dudoward became the “agent” for Ocean Fishing by at least January 27, 2000, there is no evidence that he was the agent at the time of the transfer of shares from one share holder to another, in the period July 1, 1999 to October 27, 1999. In my view, the Delegate correctly determined that Mr. Dudoward was not the listing salesperson. Further, it is apparent that Mr. Dudoward was not the selling salesperson, as there is no evidence that he made any efforts that were instrumental in effecting a transfer of the shares between Nordstrom and Ocean Fisheries.

Further, it is my view, that this transaction did not attract a commission payable by Ocean Fisheries, and there is no evidence that Ocean Fisheries ever paid a commission in respect of the non-cash transfer between shareholders. The evidence of the Employer is that at all material times while the MV Terri Christina remained listed for sale, the vessel was being used by an owner. There was no evidence tendered which revoked the listing agreement. There was no documentation of a “re-listing of the vessel”, as suggested by Mr. Dudoward.

The entitlement of Mr. Dudoward to a commission rests in part upon the sale of a vessel, as the owner is not obliged to pay a commission unless the vessel is sold. The evidence in this case shows that the shares were traded from one “co-venturer” to another, and the trade was documented by way of a bill of sale for \$1.00. I note that in the listing agreement, the commission is calculated by way of a sale price. The sale price noted in the listing agreement (\$425,000) is substantially different than the “\$1.00 and other good and valuable consideration”, noted in the bill of sale. In this case, it is not possible to ascertain the true

sale price. I note that the listing agreement does not define the word “sale”, but the commission appears to rest on the payment of a “selling price”. In my view, the transfer of shares from one shareholder to the other is not a sale.

There was evidence before the Delegate by way of a letter from Ocean Fisheries Ltd. dated November 29, 2002 indicating:

If French Creek found a buyer for one of our vessels, we would pay French Creek a commission.

In my view, there is no evidence of any effort by French Creek or Mr. Dudoward which resulted in the sale of the MV Teri Christina. The co-venturer, Ocean Fisheries Limited was well aware from its own knowledge, of the vessel, and French Creek did not find a buyer for the vessel. The effort of French Creek and Mr. Dudoward, did not result in the “sale” or trade in the shares of the MV Teri Christina from Nordstrom Enterprises Ltd. to Ocean Fisheries Limited. In my view, under the terms of the listing agreement, there is no entitlement to a commission by French Creek, and therefore no entitlement of Mr. Dudoward to any sharing of that commission.

In the result, I agree with the Delegate that Mr. Dudoward was not the listing agent in the agreement at the time of the transfer of the shares between the shareholders of the MV Teri Christina. I am satisfied that given the peculiar facts in this transaction, Mr. Dudoward cannot be characterized as a selling salesperson. Further, I am not satisfied that this is a transaction which attracts the payment of a commission to French Creek Boat Sales Ltd. by Ocean Fisheries, given that it was essentially a “non-cash trade of shares”. While the non-cash trade of shares amounted to a change in ownership of the vessel requiring a bill of sale, and registry of the transaction with the Registrar of Shipping, I am not satisfied that this triggered any obligation of Ocean Fisheries to French Creek. Even if Mr. Dudoward was the listing agent, no commission was payable because there was no sale of the vessel attracting the payment of commission, under the listing agreement.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated December 31, 2002 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal