Appeals

- by -

Dion Entertainment Corp.

- by -

Evan Camp

- and by -

Marilyn Camp

- 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/93, 2003A/94 & 2003A/95

DATE OF DECISION: July 15, 2003

DECISION

OVERVIEW

This is a decision in appeals filed by Evan Camp, Marilyn Camp (the "Employees") and Dion Entertainment Corp. ("Dion Entertainment" or "Employer") from a Determination dated February 18, 2003 (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. and Ms. Camp were employees of Dion Entertainment Corp. The Delegate found that Mr. and Ms. Camp were entitled to commissions or bonuses on bingo travel packages sold, in the amount of $9,032.10, vacation pay of $361.28, and interest in the amount of $460.79, for a total of $9,854.17. Each employee was entitled to one half of $9854.17, or the sum of $4,927.09. The Employees complained that the Delegate erred in findings related to commission earnings, and vacation pay. Each of the Employees claimed that he or she ought to be entitled to full commissions on a larger number of packages, and vacation pay. Dion Entertainment also filed an appeal alleging a breach of natural justice. The Delegate conducted an oral hearing, which was attended by the Employees, and a representative of the Employer.

The Employer argued that there was an error in natural justice arising from the representation of the Employer at the hearing by Dwayne Bauer, an account executive. The Employer's representative on appeal, was another director, Louis Dion, who was also the Chief Executive Officer and Vice President of Sales for the Employer. The Employer did not show that Mr. Bauer was unauthorized to represent the company at the hearing, nor did the Employer establish any error arising from Mr. Bauer's participation in the appeal. I dismissed the appeal of the Employer, as the Employer did not develop any argument related to natural justice, and did not demonstrate any error in the Determination.

I also dismissed the appeals of Mr. and Ms. Camp. The grounds of appeal raised by Mr. and Ms. Camp were identical. Both Employees claimed that they were each entitled to a full commission based on a sale, and on more sales than the Delegate accepted. The Delegate's findings on the number of packages sold was based on evidence, and the Delegate determined a lesser amount. The evidence of the number of packages sold, tendered by the Employees, was inconsistent. The Employees did not establish an error in the number of packages sold.

Each Employee claimed a full commission, because each employee had an employment contract in writing with the Employer, and each Employee participated in the sale of a package, either as an "opener" or as a "closer"). An employee was entitled to be paid a commission or bonus based on a "consummated" sale of a package. While each employee signed an employment agreement, it was clear from a reading of each of the agreements that the right to a commission was based on a "consummated sale". A consummated or completed sale can only be completed once (eg. a customer a package can only be sold, paid for and delivered once). While there were obvious typographical errors in each of the employment agreements, it was apparent that where two or more persons participated in a sale, the commission went to the person who first dealt with the customer, not to the person who consummated the sale. The Delegate correctly determined that only one bonus was payable when a package was sold, regardless of the number of employees participating in the sale.

The records before the Delegate were unsatisfactory for the Delegate to distinguish cases where Mr. Camp, or Ms. Camp alone consummated a sale. The evidence before the Delegate suggested that Mr. and Ms. Camp worked together, and would act as an "opener" or a "closer" (alternating function) from

transaction to transaction. The Delegate split the commission entitlement based on a 50 - 50 basis. I was not satisfied that a different split should apply.

I note that while both Mr. and Ms. Camp submitted an appeal form, claiming an error with regard to vacation pay, I am not satisfied that the Delegate erred. The Delegate found that each employee had taken a paid vacation. Neither Mr. nor Ms. Camp developed the argument for an error in the vacation pay in the appeal submission.

ISSUES:

Did the Employer raise any issue of error in the Determination?

Did the Delegate err in the Determination of the number of packages sold by Mr. and Ms. Camp?

Did the Delegate err in concluding that one bonus was to be paid for each package sold?

Did the Delegate err in the split of the bonus amount on a 50 -50 basis between Mr. and Ms. Camp?

Did the Delegate err in the calculation of vacation pay?

FACTS

The Delegate conducted an oral hearing on November 29, 2002, and issued the Determination on February 18, 2003. All parties have filed an appeal of the Determination. Each party appealing has filed an appeal form, and a submission. I decided these appeals, on the basis of written submissions, after considering the notices of appeal filed by Mr. Camp, Ms. Camp and Dion Entertainment Corp., the written submissions of the Employer and Employees, and reading the Determination and the record supplied by the Delegate. It is convenient to issue one Decision that deals with all the appeals filed by all the parties.

Evan Camp and Marilyn Camp were employed by Dion Entertainment Corp. as telemarketers of bingo travel packages. Ms. Camp was employed between July 5, 2000 and December 12, 2002. Mr. Camp was employed between January 5, 2001 and December 12, 2002.

At the hearing before the Delegate, each of Mr. and Ms. Camp maintained an entitlement to a commission based on the sale of "packages". The commission for the packages was $5,610.00 US or $9,032.10. Each person claimed $9,032.10.

Ms. Camp and the Employer filed an agreed statement of facts indicating the rate of pay was $3,000 per month effective October 1, 2001, plus commissions. Mr. Camp and the Employer filed an agreement statement of fact, in similar terms. The dispute before the Delegate was "unpaid commissions and unpaid vacation pay". The position taken by Mr. and Ms. Camp before the Delegate was that when a sale was made, the Employer was obliged to pay a commission to each of them, because they each participated in the sale to the customer.

The bonus clause in the employment agreement for Marilyn Camp reads as follows:

> **Compensation**
>
> In consideration of the services rendered by the Employee hereunder, the Company shall
>
> ...
>
> (b) pay to the Salesman a sales bonus as follows
>
> (i) $20. USD per Player Travel Package for the first 500 such packages sold by the Employee;
>
> (ii) $30 US per Player Travel Package for all packages sold by the Employee in excess of 500;
>
> (iii) $10 USD per Companion Player Travel Package for the first 500 such packages sold;
>
> (iv) $15 USD per Companion Travel Package for all packages sold by the Employee in excess of $500.
>
> The bonus is to be calculated each month and payable on or before the 15th day of the month immediately following; provided that no bonus is payable on packages which are sold to corporate sponsors, internet winners, Dion Entertainment Corp. operated bingo halls or participants from the Brazil group, which includes Argentina, Spain or England, which are sold for a price that has been discounted from the Company's standard rates or which are Companion Travel Packages, but further provided that for the purpose of calculating the bonus a consummated sale of a travel package shall be considered a sale by the Employee if the first contact with the purchaser is made by the Employee even though the sale is ultimately consummated another employee of the Company.

Mr. Camp signed an independent contractor agreement with Dion Entertainment Corporation. I do not put any distinction on whether the agreement is characterized as an independent contractor or employment agreement. Both Mr. and Ms. Camp were employees. I note that the agreement signed by Evan Camp, is in a substantially similar, but not identical form, to the agreement signed by Ms. Camp. The method of bonus calculation set out in clause 5(b) of the agreement for each employee provided for a similar method of calculation. The only difference is that both clauses appear to contain different typographical errors in the language relating to commission entitlement where the sale was ultimately consummated by a salesman (employee) other than the salesman (employee) having initial contact with the purchaser. Ms. Camp's agreement omits the word "by" from the phrase "... even though the sale is ultimately consummated (sic) another employee of the Company". Mr. Camp's agreement reads "...even though the sale is ultimately consummated (sic) an employee of the company". The grammar in each contractual clause is incorrect, and must be read to include the word "by".

The Delegate found:

> While each of the Camps had their own commission contracts I cannot award double payment for one sale. Each contract calls for a monetary amount in commissions per package sold. If in fact the Camps wish to share the profit from each sale, that is their prerogative. Neither of the contracts calls for Dion to pay twice for the same sale.

The Delegate rejected the argument presented by Mr. and Mrs. Camp that each was entitled to be paid the full commission based on a sale, on the basis that each party contributed to the sale.

The Delegate commented on the unsatisfactory nature of the evidence before him:

> The records produced by the Camps are not clear enough to allow the adjudicator to make an exact ruling on the number of sales packages sold by the Camps. Dion did not provide a record of commissions sold by package or employee.
>
> The Camps submitted an invoice for 354 packages, which is 33 packages less than recorded on the two reports. Given Dion maintains some packages were sold to corporate sponsors and Dion corp. operated bingo halls I am awarding the lesser number of 354 packages to the Camps as per their invoice. This is the amount which they maintain they sold and I can find no evidence to dispute their claim.

In the record provided by the Delegate, there are records which indicate the hours worked by each of Mr. and Mrs. Camp. The claim advanced, was however, for the commission or bonus, not for regular wages. The "hours worked" documents are of no assistance in determining entitlement to bonuses. The information before the Delegate related to sales made was in dispute. There was an internal inconsistency in the documents advanced by Mr. and Mrs. Camp to the Delegate. A sales invoice provided by Mr. & Mrs. Camp indicated the sale of 354 packages. The sales summary recorded 387 sales. The evidence accepted by the Delegate was that 354 packages were sold by "the Camps". A larger number of sales were recorded on reports, however, the Delegate accepted the argument of Dion Corp, that some of the sales were to corporate sponsors and to Dion Corp. operated bingo halls, and that no commission was to be paid on those sales.

The Delegate found that there was $18,064.20 in sales, and the commission of $9,032.10 was to be split between Mr. and Mrs. Camp in the amount of $4,516.05 to each of Mr. and Mrs. Camp. The Delegate found no entitlement to vacation pay. The Delegate also found that a deduction for rent on a trailer and wages increases occasioned by a payroll change/addition were unauthorized business deductions pursuant to section 21 and 22 of the *Act*.

The Delegate found breaches of sections 17(1), 21(1) of the *Act*. The Delegate did not impose a penalty because there had been no previous contravention of the *Act* by the Employer, and the Delegate was not satisfied that a disincentive was necessary to promote compliance by the Employer with the *Act*.

Employees' Submissions:

I note that each Employee has filed an identical appeal form, and an identical submission. Mr. Camp alleges that the Director erred in law by taking two cases and making one. He seeks to change or vary the Determination:

> we both want to be paid commission (Marilyn Camp Evan Camp)
> - holiday pay wrong

Ms. Camp has made an identical appeal form containing an identical submission.

Each employee's submission, which included a copy of the Determination is hand annotated, with alleged errors. No separate argument is developed with respect to the errors.

Employer's Submission:

The Employer submits the Delegate failed to observe the principles of natural justice. The particular allegation is that the Delegate did not get the information from the proper representative of the company. Mr. Dion, on behalf of the Employer states:

> I Louis Dion believe as a new director but is very knowlegable (sic) in this action believe that the director of employment standards did not get the proper information from the proper representative of the company. I believe the information given was in error which requires an adjustment.

I note that the Employer has not identified the errors or the adjustment required as a result of errors alleged.

Delegate's Argument:

The Delegate provided the record, but did not provide a submission.

ANALYSIS

Section 112 (1)(c) of the *Act* provides for an appeal on grounds that:

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was made.

In an appeal of a Determination, the burden rests with the appellant, to demonstrate an error such that I should vary or cancel the Determination. As each of persons filing an appeal is also, an appellant and a respondent, depending on the "appeal", I will consider first the appeal of the Employer.

Employer's Appeal:

The Employer argued that there was an error in natural justice arising from the representation of the Employer at the hearing by Dwayne Bauer, an account executive. The Employer's representative on appeal, was another director, Louis Dion, who was also the Chief Executive Officer and Vice President of Sales for the Employer.

The Employer bears the burden of establishing an error such that I should vary or cancel the Determination. The Employer has failed to give any particulars of the error. At the hearing before the Delegate, the Employer was represented by Dwayne Bauer, who held himself out as a director and employee of the company. The Employer has not disputed that Dwayne Bauer was a director or employee of the company. The Employer did not show that Mr. Bauer was unauthorized to represent the company at the hearing. The Employer did not establish any error arising from Mr. Bauer's participation in the appeal. Further, the Employer has not demonstrated any errors or particularized any errors in the Determination. I would dismiss the Employer's appeal, as the Employer has not established any breach of natural justice, or any error in the Determination.

Employees' Appeal:

I note that Mr. Camp and Ms. Camp have both filed separate appeals. Both these appellants bear the burden of establishing an error such that I should vary or cancel the Determination. The error alleged in each appeal, however, is that the Delegate erred in law by "lumping" both claims together, rather than treating them as individuals. The point raised is that each Employee is entitled to a full commission, since each Employee participated in the work leading to all commissions. Each Employee alleges that more sales completed, than found by the Delegate. Each Employee claims vacation pay. As the point raised in each appeal is a point common to both appeals, and the analysis is identical, I will deal with analysis below.

Number of Packages Sold:

No evidence has been presented by Mr. or Ms. Camp to suggest that the Delegate erred in determining commission based on 354 sales. The evidence presented by each of Mr. and Ms. Camp to the Delegate was internally inconsistent. The invoices set out 354 packages sold, and the sales report set out 387 sales. The Delegate found an entitlement based on 354 packages sold. The Delegate resolved the inconsistency by considering that some of the sales could have been sales for which no commission was owing because they were "house" sales or "reduced commission" sales. I see no basis in the appeal submissions, or in the record to interfere with this finding of fact made by the Delegate. There appears to be a reasonable basis in the record for this finding.

One Bonus Per Package Sold?

The real issue in this case is whether Mr. Camp is entitled to a commission based on 354 sales, and Ms. Camp is entitled to a commission based on 354 sales. This would necessitate the Employer to, in effect, pay the commission twice. The entitlement to a bonus depends on the wage bargain between the parties. That wage bargain can be found in the agreements that each Employee had separately with the Employer. A separate agreement, or two employment contracts, does not necessarily, however, dictate a finding that each employee is entitled to a commission on a sale.

The Delegate correctly construed the bonus clause. The bonus is calculated based on "consummated sales". The word "consummated" in the context used in the clause, means completed sales. A sale can only be completed once - with order, delivery and payment of the product. The bonus clause also provides for a mechanism for allocating entitlement to bonus where two or more persons participate in the sale:

> for the purpose of calculating the bonus a consummated sale of a travel package shall be considered a sale by the Salesman if the first contact with the purchaser is made by the Salesman even though the sale is ultimately consummated [by] an employee of the Company.

The word "by" has to be read into this clause to give it any sense. If two or more employees work on the sale, the employee receiving credit, for bonus purposes, is the employee with whom the customer had first contact. In my view, the clear meaning of the clause disposes of the argument by each of Mr. and Ms. Camp to two commissions based on one sale.

I further note that the agreement signed by Mr. Camp was an independent contractor agreement, and Ms. Camp's agreement was an employment agreement. In my view, nothing turns on this distinction. Each person was an employee, paid a monthly salary, with a productivity incentive in the form of a bonus. Each person had a similar bonus clause with the Employer. The agreement signed by Mr. Camp provided for Professional responsibility, which gave wide latitude to a salesperson to devise methods of sale:

> 9. Professional Responsibility. Nothing in this Agreement shall be construed to interfere with or otherwise affect the rendering of services by the Salesman in accordance with his independent and professional judgement. The Salesman shall perform his services substantially in accordance with generally accepted practices and principles of his trade. This Agreement shall be subject to the rules and regulations of any and all organizations and associations to which the Salesman may from time to time belong and to the laws and regulations governing the practice of the Salesman's trade in this Province.

Ms. Camp's agreement contains no such clause.

Here, apparently Mr. and Mrs. Camp cooperated in the sales providing for separate initial contact (an "opener"), and a separate "closer". This would vary from transaction to transaction. This was a sales strategy which was apparently of some assistance. However, each Employee was paid a salary for time spent working for the Employer. This amount is in excess of the minimum wage. Nothing in the language of the bonus clause requires the Employer to pay two bonuses on one sale. The calculation scheme set out in the clause implies one bonus is to be paid, with payment to the salesperson first contacted, in the event two or more salespersons participated in the sale.

In my view, the Delegate correctly decided that the Employer was required to pay only one bonus on the sales. I would, therefore dismiss the main appeal point raised by Mr. and Ms. Camp in their appeals.

Division of the Bonus:

In my view, it was somewhat unusual for the Delegate to divide the bonus on a 50 - 50 basis. The basis for doing so appears to be that both parties worked together on the sale, and each employee fulfilled the role of "opener" and "closer", but this varied from transaction to transaction. In determining a bonus entitlement, the real question was who consummated the sale and who first spoke to the customer. It was perhaps open to the Delegate to inquire more precisely into the commission entitlement of each of Mr. and Ms. Camp, rather than splitting the commissions on a 50 -50 basis. For example, the Delegate could have asked the questions:

(a) Did two or more Employees work with the customer in completing a sale?

(b) Which Employee did the customer speak to first?

The answers to these questions would have led to a precise split of the bonus between Mr. and Ms. Camp. The record before the Delegate appears to demonstrate that either Mr. or Ms Camp were entitled to the bonus, but not specific enough to say who was the introducing party when both parties participated in a sale. The Delegate appears to have applied a common-sense approach which reflected the imprecise evidence before him, the evidence that both Mr. and Ms. Camp participated in a sale, and apportioned the commissions between each of Mr. and Ms. Camp on a 50 - 50 basis.

I am not satisfied that Ms. Camp has demonstrated an entitlement different than what was Determined by the Delegate. I therefore dismiss her appeal for the full amount of $9,032.10. Likewise, I am not satisfied that Mr. Camp has demonstrated a bonus entitlement different than what was found by the Delegate. I therefore dismiss Mr. Camp's appeal for the full amount of $9,032.10.

Vacation Pay:

I note that wages is defined in section 1 of the *Act* as including a bonus. Ordinarily vacation pay is payable on a bonus. The Delegate allowed the sum of $361.28 for vacation pay on the bonus. The Delegate did not allow any vacation pay on the regular monthly wage. The Delegate dealt with the vacation pay claim on regular wages in the Determination as follows:

> The Camps confirmed they had 12 paid days off during 2001. Section 57(1)(a) of the Act requires an employer must give an employee an annual vacation of at least two weeks, after 12 consecutive months of employment.
>
> The payroll records submitted at the hearing by and for the Camps show a total of 10 paid days off excluding statutory holidays. I find that the Camps received the required two weeks vacation after 12 consecutive months of employment as required by section 57(10 of the Act and are not entitled to additional vacation pay.

Mr. and Ms. Camp claim that vacation pay is owed. The only reference to vacation pay in the separate appeal submissions of Mr. and Ms. Camp is an annotation on page 8 of the Reasons for the Determination:

> Allowable holiday pay works out to 45.16 per day each our pay was higher than this

In my view, this hand notation on a Determination of an error, is not particularly helpful to the Tribunal unless there is some further discussion of that error in a submission, combined with some "proof" related to the error. Neither Mr. nor Ms. Camp elaborated on this point in their appeal submissions. No proof of the error was offered by either Mr. or Ms. Camp in their submissions. This comment does not persuade me that the Delegate erred in law in the assessment of the claim for vacation pay.

For all the above reasons, each of the appeals is dismissed.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated February 18, 2003 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal