

An appeal

- by -

Alan J. Schianni  
("Schianni" 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/135

**DATE OF DECISION:** July 23, 2003

## DECISION

### OVERVIEW

This is an appeal by an employee, Alan J. Schianni (“Schianni” or “Employee”), from a Determination dated April 4, 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”). The Employee complained that he was entitled to a commission from the sale of a vehicle, while employed as a salesman with Marine Chrysler Dodge Jeep (the “Employer”). The Employee had received a partial payment, but not the full commission in respect of the sale of one vehicle. The Delegate conducted an oral hearing, which was attended by the Employee, and three witnesses on behalf of the Employer. The customer was not produced as a witness, and the statutory declaration of the customer’s evidence provided by the Employer was given minimal weight by the Delegate.

The Delegate determined no wages were owing to Mr. Schianni, and that the *Act* had not been contravened by the Employer. The Employee alleges an error of natural justice or bias in the Delegate, and that the Delegate considered an “improper consideration” in deciding that he was not entitled to a commission. It is apparent that the Delegate had contradictory evidence before her at the hearing. The Delegate resolved those contradictions against the Employee, and found no entitlement to a commission because Mr. Schianni had not introduced the vehicle to the customer, had not taken the customer to test drive the vehicle, had not been present when the price was discussed or agreed to by the customer, was not present when the customer paid the deposit or balance of the purchase price. It was apparent that Mr. Schianni, at some point met with the customer, and affixed the licence plates to the vehicle. The Delegate found that Mr. Schianni’s work was minimal and he was not entitled to a full commission. The Delegate canvassed fully the issues which were agreed to by the parties in an agreed statement of facts. It was apparent that the Delegate fully canvassed the facts in this case, and considered contradictory evidence. Resolving contradictory evidence against one party is not in and of itself evidence of bias or a breach of natural justice. The Tribunal is not satisfied that the Employee has demonstrated any error in the Determination.

### ISSUE:

Did the Employee establish the Delegate erred in the Determination, by basing the Determination on an irrelevant consideration, and by failing to address whether the Employee had earned the full commission?

Did the Employee establish that the Delegate was biased?

### FACTS

I decided this case, on the basis of written submissions, after considering the notice of appeal filed by the Employee, the written submissions of the Employer and Employee, and reading the Determination and the record supplied by the Delegate. The Delegate conducted a hearing into this matter on March 25, 2003, and issued the Determination and written reasons on April 4, 2003. At the oral hearing, the Delegate considered the evidence of Mr. Schianni. The Delegate also heard from David Barke, the senior sales manager; Ted Warkentin, president and general manager; and Gerry Pettifer, the general service and

parts manager. The Delegate also considered, but placed no weight on, a statutory declaration from the customer.

Mr. Schianni worked as a salesperson at Marine Chrysler Dodge Jeep Ltd. (“Employer” or “dealership”). After leaving his employment, he filed a complaint alleging that he was entitled to a commission, in the amount of \$1050.00 on the sale of a vehicle. This sale was described as deal #18300. He was paid \$275.00 for the sale, and alleges a balance owing of \$775.00.

The vehicle was purchased by a customer whose brother worked at the dealership as a mechanic. The evidence at the hearing tendered by the Employer was that Gerry Pettifer was approached by the customer’s brother after the vehicle was purchased by the dealership and while the vehicle was being “prepared for sale”. Pettifer consulted with David Barker, the sales manager, and had discussions about price. Pettifer relayed the price set by Barker, and possibly Warkentin to the mechanic. Pettifer also advised that a deposit would have to be paid to hold the vehicle. On February 11, 2002 the customer came into the dealership with his father, and met briefly with Pettifer and Barker. David Barker’s evidence was that he wrote up the sales deal.

It appears that Mr. Schianni at least put the plates on the vehicle, at the time of delivery of the vehicle to the customer, but was not engaged in setting the price or negotiating the sale of the vehicle. It appears that Mr. Schianni was not present at any meeting with the customer where written documents were prepared, where the customer paid a deposit, or paid the final purchase price on the vehicle.

The Delegate found that deal #18300 was a house deal, and that Mr. Schianni was entitled to the sum of \$150.00. The Delegate found that Mr. Schianni was paid more than a house deal. The Delegate found that the Employer paid more than the amount of the house deal to Mr. Schianni, as a discretionary top up, and therefore found no wages were owing.

I note that the Employee’s version of facts was advanced at the hearing, and is recited by the Delegate at pages 2 and 3 of the Determination. The position advanced by the Employee was that he was assigned to the deal, but he was not paid for the work he performed. The Delegate did not accept the facts advanced by the Employee at the hearing.

### **Employee’s Submission:**

The Employee submits that the Delegate failed to observe the principles of natural justice. The Employee submits that the Delegate was biased in favour of the Employer. The Employer says that the evidence of bias arises from a comment by the Delegate in the Determination that she “wouldn’t be prepared to examine all the duties associated with earning 100 % of the commission payable on the sale of a vehicle”. The Employee says that the Delegate based her decision on an improper consideration of a “house deal”, which was irrelevant to the issue of whether the Employee was entitled to 100 % of the commission associated with the sale of the vehicle. The Employee says that the purpose of the hearing was to determine whether he performed the duties associated with earning 100 % of the commission.

**Employer's Submission:**

The Employer submits that it supports the Determination made by the Delegate. The Employer would have preferred that the Delegate place some weight on the statutory declaration from the customer that it filed at the proceedings.

**Delegate's Argument:**

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

**ANALYSIS**

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

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.

It is convenient in this appeal to address first the Employee's contention that a "house deal" was irrelevant to whether he earned a commission.

**Was a "house deal" irrelevant to the issue of whether the Employee earned the commission?**

The Employee has argued that it was irrelevant for the Delegate to consider whether the sale was "a house deal". In my view, it was highly relevant for the Delegate to consider the competing facts and arguments of the parties, and the Delegate does appear to have considered the facts and arguments presented. The issues in dispute identified in the agreed statement of facts, signed by the Employer and the Employee were:

- Whether commissions have been correctly paid to Mr. Schianni.
- Whether commissions are owed on deal #18300 (Mike Fernandes) at 25 % of commissionable gross or whether it was a "House Deal"

The parties agreed that an issue in dispute was whether the sale was a house deal. In my view, it would have been improper for the Delegate to fail to address the "house deal issue" in the Determination given that the parties have identified this as an issue for hearing in the agreed statement of facts. I note that while the Delegate recited the Employer's interpretation as to what was a "house deal", the Delegate has made no finding as to what was a house deal, and whether this deal was a house deal. It appears that the Delegate accepted that this sale was a prospect where the source was management or a management controlled prospect, without explicitly defining a "house deal". For the reasons noted above, I reject the

Employee's argument that consideration of whether the deal was a house deal was an irrelevant consideration.

### **Did the Delegate fail to consider whether the Employee earned a full commission?**

Mr. Schianni takes issue with the words in the Determination that:

I am not prepared to examine all the duties associated with earning 100 % of the commission payable on the sale of the vehicle, however, I am convinced that Schianni's involvement in this particular sale was minimal. I find that deal #18300 was a house deal for which Schianni was properly compensated under his contract of employment.

The Delegate appears to have conducted a hearing where the Delegate heard evidence from parties, and witnesses. The Delegate appears to have properly identified the issue for consideration at page 2 of the Determination:

The only issue to be determined is whether or not the complainant is owed commissions on the sale of a 1999 Dodge Dakota truck (deal #18300).

I note that while the Employee alleges the Delegate did not "examine all the duties", the Employee has not particularized any important duties that the Delegate neglected or failed to consider in determining a minimal involvement with deal #18300.

In reviewing the whole of the Determination, it is apparent that the Delegate considered the evidence of the parties and the witnesses. It is apparent that the Employee had some connection to the sale of the vehicle. The Delegate found as a fact, that Mr. Schianni's involvement with that deal was "minimal". The Delegate appears to have considered the conflicting evidence of the parties concerning this "deal" and particularly the work performed by Mr. Schianni in connection with the "deal". The Delegate did not accept the evidence of Mr. Schianni that he had initial contact with the customer. The Delegate found as a fact that the customer had learned of the vehicle through his brother who was employed as a mechanic, and that the customer first viewed the vehicle in the presence of his brother and Mr. Pettifer. The Delegate accepted Mr. Schianni's evidence that he met the customer at the car lot, but was not persuaded that Mr. Schianni introduced the customer to the vehicle.

The Delegate did not accept Mr. Schianni's evidence that he took the customer for a test drive in the vehicle. He found Mr. Schianni's account to be "vague and unconvincing". The Delegate examined the records on the critical dates, and found that Mr. Schianni was not present with the customer at the time when either the deposit or final purchase price credit card transactions were processed by the dealership. Mr. Schianni was unaware that the customer had paid a deposit or the final purchase price. Mr. Schianni did not write up the deal, it was written up by a manager.

In considering the contradictory evidence, it was clear that the Employee had some degree of involvement with the sale in the sense that Mr. Schianni did meet the customer at some point at the car lot, may have had some discussions about the vehicle, and may have affixed the licence plates to the vehicle on the date of delivery. In this context, it is apparent that Mr. Schianni was entitled to some minimal payment for his minimal degree of involvement with the sale. It is also apparent that he received more than the amount usually paid for a house deal set out in the commission plan.

### **The Commission Plan:**

The Employer filed a copy of the commission plan, which was part of the record before the Delegate. Under the commission plan an Employee can earn some compensation without having actually sold the vehicle. For example, money can be earned from a house deal or from a delivery fee. These fees or commissions are set at a lesser rate than the commission rate for selling a vehicle. The competing submissions before the Delegate made by the Employer was that Mr. Schianni was entitled to a minimal commission as a house deal and by Mr. Schianni that he was entitled to a full commission. In analyzing the issue of commission entitlement identified at page two of the Determination, the Delegate considered the initial contact between the customer and the dealership, and the work performed by Schianni in order to make the sale. The Delegate considered the work to be minimal, and that the Employee had not earned a commission as the selling salesperson.

I note that in the first instance, before the Delegate, it is up to the Employee to demonstrate an entitlement to wages. The Delegate was not satisfied in this case, that Mr. Schianni had earned an entitlement to a full commission on deal #18300. The Commission plan contemplates payment of delivery fees, commissions, and splits in commission:

A delivery fee of \$75.00, to be deducted from the selling commission, will be paid to any Salesperson who does a delivery for another Salesperson, whether that other Salesperson is still employed by marine Chrysler or not. No credit for the deal or the commissionable gross will be given with the delivery fee. At the Sales Manager's discretion, a Salesperson can be awarded a split of a deal, if in the Sales manger's opinion that Salesperson put more work into the deal than merely the delivery, when the selling Salesperson is not available. Normal commissioning would then apply.

In the commission plan, the commission with respect to house deals is set out as follows:

A flat delivery fee of \$150.00 per vehicle sales will be paid to the Salesperson assigned to the deal. No credit will be given to the Salesperson for the unit or the commissionable gross profit.

The commission plan distinguishes between "monthly commission and bonuses" which appears to relate to sales made by a salesperson, and house deals.

The Delegate has to make a Determination as to whether Mr. Schianni earned a commission. In my view, the Delegate made a careful examination of all the circumstances surrounding "deal 18300". It is apparent, from the evidence before the Delegate, which the Delegate accepted, that Mr. Schianni did not introduce the vehicle to the customer, did not demonstrate the vehicle to the customer, and was not involved in the price setting, was not involved in the making of the written contract, or the taking of deposits or final payments from the customer. She considered the submissions and evidence related to the "work" performed by Schianni in order to make this sale (at p. 3). The Delegate did not accept the Employee's evidence as to the "work" that he alleged he did, and appears to have preferred the evidence of the Employer's witnesses as "more plausible".

The facts found by the Delegate were not sufficient to support an inference that Mr. Schianni was the selling salesperson. It is apparent that the Delegate did not consider that Mr. Schianni earned a commission. Mr. Schianni's minimal contribution to the sale appears to be somewhere between an entitlement to just a delivery fee, and credit for the entire deal. The commission plan contemplates partial

payments, or a split in the commission for work which is “more than a delivery, at the discretion of the Employer. This is reflected in the payment made to him by the Employer.

The basic thrust of this case, is that the Employee does not accept the findings of fact made by the Delegate. The Employee argues “natural justice”, but in fact, there is no development of that “theory” in his appeal submission. I am not satisfied that the Employee has demonstrated any error in the Determination. The nature and extent of Mr. Schianni’s work was fully canvassed by the Delegate in the Determination. There is an evidentiary foundation for the Delegate’s finding that the work performed by Mr. Schianni was minimal, and that he was not entitled to a full commission. The Delegate has given written reasons why she preferred the evidence of witnesses other than the Employee. Accepting the evidence of one party or a witness, in preference to that of another witness, does not in and of itself demonstrate a breach of natural justice. Indeed, a Delegate who conducts a hearing has a duty to resolve the conflicts in the evidence, material to a finding of fact, and make findings of fact. I see nothing unreasonable about the findings of fact made by the Delegate. There appears to be an evidentiary basis for the findings made. It is my view that the Delegate appears to have correctly evaluated Mr. Schianni’s entitlement, based on his minimal contribution to the sale of this vehicle.

The Employee has alleged bias, but there is no factual foundation for this allegation. The Delegate heard from both parties, and there is no evidence of a predisposition toward either party. I therefore dismiss the appeal, for the reasons noted above.

## **ORDER**

Pursuant to s. 115 of the *Act* the Determination dated April 4, 2003 is confirmed.

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**