

An appeal

- by -

Dennison Chevrolet Oldsmobile Ltd.
("Dennison")

- 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: David B. Stevenson

FILE No.: 2003A/170

DATE OF DECISION: August 19, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Dennison Chevrolet Oldsmobile Ltd. (“Dennison”) of a Determination that was issued on June 12, 2003 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Dennison had contravened Part 3, Section 17(1) of the *Act* in respect of the employment of Henry Lee (“Lee”) and ordered Dennison to cease contravening and to comply with the *Act* and *Regulations* and to pay Lee an amount of \$2,030.25.

Dennison challenges the conclusion of the Director that Lee was owed the amount ordered to be paid. The appeal is grounded on an assertion that the Director failed to comply with principles of natural justice by allowing Lee to manipulate the amount of salary he received. Dennison also says there is new evidence which was not available when the Determination was made.

The Tribunal has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issue in this appeal is whether Dennison has shown the Director erred in concluding Lee was entitled to wages under the *Act*.

FACTS

The Determination provided the following background facts and information:

The Employer employed Lee as an automobile salesperson from 1 April 2000 through 14 November 2001.

Lee was paid on a commission basis for vehicle sales and for the sale of business office products such as extended warranties, vehicle protection packages etc. Lee was guaranteed a base salary under his employment agreement and in months when his commissions were less than this base amount, his wages would be topped up to the base salary.

The dispute involves commissions which Lee is claiming in respect of three vehicle sales and in respect of \$457.50 in business office bonuses. For reasons which will be set out below, the Employer believes that Lee is not owed any of the commission amounts claimed, but the parties agree on the amounts in dispute. The first vehicle sale involved a vehicle with stock number 129923 (“deal 129923”). It took place in February 2001 and the commission on that sale would have been \$1,175.75. The second vehicle sale involved a vehicle with stock number 128529 (“deal 128529”). It also took place in February 2001 and the commission on that sale would have been \$729.98. The final vehicle sale involved a vehicle with stock number 218197 (“deal 218197”). It took place in November 2001 and the commission on that sale would have been \$92.50. In February 2001, Lee was paid \$607.55 in salary top up, an amount that would not have been paid had the commissions been paid. It must, therefore, be deducted from any commission amounts claimed. Similarly, in November 2001, Lee was paid \$19.37 in top-up and this amount must be deducted.

During the investigation, Dennison argued that Lee was not entitled to any commission on deals 129923 and 128529 as the purchaser of the vehicles had allegedly exported the vehicles out of Canada. Dennison also argued Lee was not entitled to commission on deal 218197 as delivery of the vehicle was not completed until 5 days after his employment with Dennison ended and, because Lee had not complied with the policy that required business office bonuses to be cashed in the month they were earned, had lost that bonus.

On the issue relating to deals 129923 and 128529, the Director found that Dennison had suffered no loss on the deals and had not established the existence of a clear and consistent policy with respect to payment of commission on vehicles that are exported out of Canada or that, if there was a policy, that Lee was aware of it. The Director concluded Lee was owed commissions on those deals.

On deal 218197, there was no dispute that Lee did most of the work on that deal, the only aspect of the deal in which he was not involved was the actual delivery of the vehicle to the purchaser. Lee claimed entitlement to 50% of the commission. The Director concluded he was owed wages for the work which he had performed and accepted that a payment of 50% percent of the full commission was appropriate. There is no appeal from this part of the Determination.

On the claim for the business office bonus, the Director made two key findings: first, that the “bonuses” were essentially flat rate commissions on the sale of business office products; and second, that Lee had completed the work for which the bonuses were to be paid.

ARGUMENT AND ANALYSIS

The burden is on Dennison to show an error in the Determination. An appeal to the Tribunal is not a re-investigation of the complaint nor is it simply an opportunity to re-argue positions taken during the investigation or fill in perceived evidentiary gaps. Dennison has indicated their appeal is grounded, in part, on fresh evidence becoming available that was not available at the time of the Determination (see paragraph 112(1)(c) of the *Act*). Fresh evidence which an appellant seeks to submit with an appeal will be tested against the following criteria:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

Dennison has included with the appeal a document which is identified as a “Home Office Letter” from General Motors Canada to its dealers concerning vehicle export and sale for resale. The document is dated 02-18-2003. It purports to be a consolidation of several “Home Office Letters” issued in 2002. Lee’s employment with Dennison ended on November 14, 2001. On their face, it does not appear that any of these documents existed when Lee’s employment ended. Accordingly, I cannot find this document to be relevant to the material issue arising and do not accept it.

In its final reply, Dennison added another document; a “Home Office Letter” dated 05-13-99. This document also concerns export and sale for resale. There are several problems with this document: first, it is apparent that the document, with the exercise of due diligence on the part of Dennison, could have been discovered and presented during the investigation; second, it was filed well after the time limited for filing an appeal had expired; third, the document is not evidence that Dennison had a “clear and consistent policy” in place with respect to exported vehicles; and fourth, it is not evidence that any policy with respect to exported vehicles was ever brought to Lee’s attention. Dennison has not provided any basis for the Tribunal to interfere with the decision of the Director that Lee was entitled to the commissions on deals 129923 and 128529.

In respect of the appeal as it relates to the “business office bonus”, I can find no merit to this aspect of the appeal.

Dennison bases this part of its appeal on an argument that the Director ought to have given effect to the policy that all “business office bonuses” must be cashed in the month during which the bonus was earned. The appeal does not challenge the key conclusions made by the findings made by the Director – that the “business office bonus” was essentially a flat rate commission on the sale of business office products and that Lee had completed the work for which the bonuses were to be paid. Simply put, the findings of the Director, and the absence of any basis for concluding those findings are wrong, means that the “business office bonus” was, for the purposes of the *Act*, wages earned. The *Act* requires an employer to pay all wages earned (Section 17) and does not allow an employer to withhold part of an employee’s wages for any purpose (Section 21). Regardless of how reasonable Dennison may believe their policy on cashing “business office bonuses” may be, it contravenes the requirements of the *Act* and the Director was correct to give it no effect, even if Lee was aware of it and had tacitly accepted it (Section 4).

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated June 12, 2003 be confirmed in the amount of \$2,030.25, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal