



An appeal

- by -

Kelly Lanz
("Lanz")

- 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: M. Gwendolynne Taylor

FILE No.: 2003A/85

DATE OF DECISION: September 2, 2003



DECISION

OVERVIEW

This is an appeal by Kelly Lanz (“Lanz”) of a Determination by the Director of Employment Standards (“Director”), dated February 3, 2003. Lanz had filed a complaint with the Director alleging that he was owed commission sales from his former employer Ratiopharm Inc. (“Ratiopharm”). The Director determined that a portion of Lanz’ claim was beyond the 2 year recovery permitted by section 80(1) of the *Act* and that for the remainder of the claim there was insufficient evidence to support Lanz’ claim.

Lanz appeals the Determination on the grounds that the Director failed to observe the principles of natural justice and that new evidence has become available. He alleges that the Director erred in finding facts. He acknowledges that of his initial claim, \$23,230.41 is not eligible for review due to the 2 year time limit. He has made minor revisions to other aspects of his claim and in the appeal he claims entitlement to \$18,813.41 plus vacation pay and back interest. In his final submission dated July 28, 2003, he summarized that his requests of the Tribunal are to a) award outstanding commissions; b) research Ratiopharm’s contravention of the ESA, determine that ESA was violated and reinstate his employment due to wrongful dismissal.

ISSUE

1. Did the Director fail to observe the principles of natural justice by not disclosing the employer’s submission prior to issuing a Determination?
2. Is Lanz entitled to additional commissions?

THE FACTS AND ANALYSIS

Lanz worked for Ratiopharm, a pharmaceutical company, from February 23, 1998 to September 17, 2001 as a Sales Representative. He received salary and commission/incentive wages. He filed his complaint with the Director on March 8, 2002. The Director noted that his claim would be limited to back wages/commissions from September 18, 1999.

In part, Lanz’ claim was based on his contention that he was performing the functions of a Key Accounts Manager, a claim that Ratiopharm disputed and the Director found was unproven. Lanz contended that he secured listings with London Drugs and Unipharm, that the accounts were subsequently transferred to other personnel in December 2000 and January 2001, respectively, and that he was to have received commissions based on 6% of sales for one year.

The Director made the following findings:

- Ratiopharm employed Mr. Lanz as a Sales Representative;
- Ratiopharm paid commission wages to Mr. Lanz pursuant to the terms of employment for a Sales Representative;



- Mr. Lanz did not assume the position of Key Account Manager or enter into an employment contract or commission contract for additional wages for key account manager duties;
- There is no contract or agreement for payment to Mr. Lanz of 6% commission of sales of Amiodarone to London Drugs;
- There is no contract or agreement for payment to Mr. Lanz of 6% commission on sales to Unipharm; and
- Mr. Lanz continued his employment with Ratiopharm despite changes to his accounts and responsibilities in June 1999 and January 2001.

In the analysis, the Director noted that Lanz was attempting to recover commissions based on different rates and terms than provided in his agreement, but there was insufficient evidence to show that Ratiopharm had agreed to additional terms. The Director found that Lanz had acquiesced in the changes to the London Drugs and Unipharm accounts and continued in his employment until September 2001. The Director concluded that there was no evidence of an agreement that Lanz would be paid one year commissions on either account.

ARGUMENT

Natural Justice

Lanz' appeal on natural justice stems from the Director's failure to communicate with him after the Director received a submission from Ratiopharm in November 2002. Lanz and his lawyer had met with the Director on October 9, 2002, after which the Director wrote to Ratiopharm. At the end of January 2003, Lanz contacted the Director and learned that a Determination had been issued denying his claim. The Director had issued a Determination dated January 24, 2003, but reissued to Mr. Lanz at his new address as of February 3, 2003.

The Director replies to Lanz' appeal stating that the reply from Ratiopharm in November 2002 did not contain any new information so it was not forwarded to Lanz.

Ratiopharm submits that Lanz' claim on natural justice grounds is unsubstantiated because Lanz had full opportunity to submit all relevant evidence and submissions to the Director. The complaint process to the Director is clear in advising that all relevant evidence is to be submitted. In addition to submitting evidence, Lanz had a meeting with the Director at which he had counsel present. The next stage in the process was for the Director to issue a Determination. Ratiopharm submits that there is nothing in this chronology that supports a claim that the Director failed to observe the principles of natural justice.

New Evidence

In the appeal, Lanz submitted information concerning a possible prosecution of drug companies, including Ratiopharm, for allegedly giving pharmacies rebates and gifts as incentives to purchase their products.

The Director submits that the "new" evidence is directed at Ratiopharm's credibility. Since the Determination was based on the facts of the case, not on credibility, the evidence should not be admitted.



Ratiopharm submits that the “new” evidence is not relevant as it has no relation to Lanz’ claim for unpaid wages.

Error of Fact

Lanz alleges that the Director erred in the following findings of facts:

1. *Ratiopharm paid commission wages to Mr. Lanz pursuant to the terms of employment for a Sales Representative;*

Lanz contends that the Director drew a false conclusion, as a result of assuming that Lanz’ claim was based solely on his eligibility under the Key Accounts Manager bonus and commission program. Lanz acknowledges that he incorrectly assumed he was entitled under the Key Accounts Manager bonus and commission program. However, despite that error, he submits that the Director erred in not considering his claim under the bonus and commission program for sales representatives. Concerning Ratiopharm’s submissions to the Director, Lanz states that Ratiopharm did not provide evidence that he had been paid the sales representative commissions. Lanz also contends that Ratiopharm attempted to introduce a technicality by referring to ‘retail territory’, although the documents for the Sales Representative Commission Program refer only to ‘territory’.

Lanz provided documentation on the sales representative bonus and commission program, and drew attention to the Commission Program provision:

Commission earnings are based on an annual program consisting of a 6% commission rate payable on profitability over and above the annual profitability objective established for the territory. i.e. Commissions are paid on the portion of profits exceeding 100% of the annual profitability objective.

Concerning the ‘territory’ issue, Lanz submits that the head offices of London Drugs and Unipharm were within his ‘territory’ although the subsidiary accounts – the retail store locations – may not have been. He submits that since the increased sales were achieved through the head offices and delivered directly to head office, he is entitled to commission for products shipped into the accounts (from which I gather he means the retail stores). He notes that Ratiopharm confirmed it had paid commissions in his retail territories for both London Drugs and Unipharm. Lanz revised his previous claim for London Drugs to reflect 46, of the total 58, store locations within his retail territory. Similarly, he revised the Unipharm claim to reflect his claim for 1/3 of the total accounts.

2. *There is no contract or agreement for payment to Mr. Lanz of 6% commission of sales of Amiodarone to London Drugs;*

Lanz contends that the Director again fell into the error of assuming that since he was not eligible for the Key Accounts Manager bonus and commission program, that was the end of the issue. Lanz submitted that he was still entitled under the bonus and commission program for sales representatives as set out in the above-quoted paragraph regarding commission earnings. He submits that is sufficient to establish that he was entitled to the 6% commission as part of his contract.

Lanz calculates his commission entitlement based on “annual profitability objectives” for the London Drugs head office account of \$150,000 and for the Unipharm head office account of \$480,000. Lanz submits he negotiated the sales and the new listings and the products arrived at the respective head



offices, within his territory. The product was then redistributed to various subsidiary accounts throughout Western Canada and British Columbia. He disputes Ratiopharm's attempt to use the redistribution to subsidiary accounts as justification to avoid paying commissions.

ANALYSIS

Nature of the Appeal

The appeal is brought under section 112 of the *Act*:

112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (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 being made.

Lanz alleges that the Director failed to observe the principles of natural justice and erred in findings of fact. He also seeks to adduce fresh evidence on the appeal. In his final submission dated July 28, 2003, he summarized that his requests of the Tribunal are to a) award outstanding commissions; b) research Ratiopharm's contravention of the ESA, determine that ESA was violated and reinstate his employment due to wrongful dismissal.

I agree with Lanz that there was new information and evidence contained in Ratiopharm's submission of November 5, 2002, and that it should have been disclosed to Lanz for his further comment or evidence. Therefore, I find that Lanz has substantiated grounds for appeal under s. 112(1)(b). I have thoroughly reviewed and analyzed the many submissions and I am satisfied that I am in a position to adjudicate the appeal without the need for an oral hearing.

Lanz has presented considerable evidence and submissions all of which I have carefully considered. His claim boils down to the fact that he secured profitable listings and believes he is entitled to additional commissions based on the annual sales exceeding the profitability objectives. He did not raise wrongful dismissal in his original claim. Prior to the July 28 correspondence, he did not raise it directly in the appeal. But he had raised it through his submissions on the attempted settlement prior to filing with the Director and in the new evidence he seeks to adduce.

The Tribunal does not have jurisdiction to reinstate Lanz' employment. The Tribunal's jurisdiction on dismissal without just cause is contained in s. 63 and is limited to finding the appropriate level of compensation. In Lanz' case, the evidence shows he was paid 3 months salary on termination. Therefore, even if I did conclude that he was unjustly dismissed (I do not have to make a finding on that in deciding this appeal), he has been compensated and there is nothing further I could order. I find that the issue concerning the new evidence is entirely related to Lanz' submissions on the grounds for his termination and the company's credibility. I find that they are not material to the issues before the Director or the issues properly before me. I decline to accept 'new evidence' as a ground of appeal and I decline to accept the new evidence in evidence.



I accept Lanz' submission that he is claiming commission entitlement through the sales representative commission program although he initially may have thought his entitlement would come through the key account manager commission program. In any event, his claim is for interest at 6% due to increased profitability. I also find that the general policy relating to the sales representative commission program applies to his employment, without the need for a specific contract term.

I have considered Lanz' submissions concerning the Director's errors and find that there is some truth to both sides. In fact, Ratiopharm did pay commission wages to Lanz as the Director found, but Lanz says there are unpaid commissions. The Director found that there was no contract for 6% commission on sales of Amiodarone to London Drugs or on sales to Unipharm. It is true that there is no term referring to these specifically. However, I find that Lanz was entitled to commissions under the general policy and to the extent that policy covers these sales, he could have been entitled to the 6% commission.

Lanz' claim is based on the policy applying to the sales of the individual products or to the individual account, i.e. London Drugs or Unipharm. In the November 5, 2002 submission, Ratiopharm submitted that commission entitlement is not calculated on the sales of one product or one customer. Ratiopharm submitted that it is based on the global territory annual sales, including other accounts that may not have been as profitable. Lanz did not respond to this submission. I find that Ratiopharm's submission is compelling. There is nothing in the evidence, particularly not in the general policy statement quoted above, that supports Lanz' position that the annual profitability objectives of each account or product are the base line. The policy specifically says "the annual profitability objective established for the territory."

Another aspect of Lanz' argument is his submission that his entitlement to commissions flows from the fact that he secured the listings and the head offices are within his jurisdiction. He referred to the *Jody Findlay* case (BC EST #D191/98) as support for his interpretation of his territory. I find that this aspect of the submissions goes to the amount that would be payable, rather than the substantial issue of whether Lanz is entitled to additional commissions. In any event, I find that the facts in *Findlay* case are not similar to this case and I find the case is not of assistance.

I find that Lanz has not substantiated his request for an award of additional commissions.

ORDER

Pursuant to section 115, I dismiss the appeal and confirm the determination dated February 3, 2003.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal