

An appeal

- by -

Campbell, Edgar Inc.
("CEI")

- 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: Lorne D. Collingwood

FILE No.: 2000/793

DATE OF DECISION: May 25, 2001

DECISION

OVERVIEW

This decision pertains to an appeal by Campbell, Edgar Inc. (who I will refer to as “CEI”, “the employer”, and also “the appellant”). The appeal is pursuant to section 112 of the *Employment Standards Act* (“the Act”). It is an October 31, 2000 Determination by a delegate of the Director of Employment Standards (“the Director”) that is appealed. That Determination orders CEI to pay Natalie Marin a total of \$4,895.16 in commissions and interest.

In the Determination, the delegate decides that Marin was instrumental in placing a person with a company that we need know only as “FF” and he awards her three quarters of the commission due for that placement. The delegate also finds that a deduction which was made from one of the employee’s paycheques is contrary to sections 21(1) and 21(2) of the *Act*.

CEI, on appeal, seeks cancellation of the Determination.

APPEARANCES:

Elaine Hay	for the appellant
Natalie Marin	on her own behalf
Michael Fu	the Director’s delegate

ISSUES TO DECIDE

The matter of whether Marin is or is not entitled to commission moneys for the placement of a person at FF is at issue. In that regard, the appellant claims that Marin had nothing to do with that placement, that it was entirely due to the efforts of Elaine Hay, the President and owner of CEI.

CEI claims that it should not be forced to return money which was deducted from Marin’s pay. On that CEI claims that the money was paid out in error and that it only makes sense that it be allowed to recover the amount. According to Hay, Marin claimed that she was owed all of the placement commission due for placing SF with a client, “S”, but it was later discovered that she is only entitled to half of the placement commission because another employee was instrumental in the placement. According to Marin, she did almost all of the work and so it is only fair that she be paid the placement commission and the other employee be paid 5 percent recruitment commission.

What I must ultimately decide is whether it has or has not been shown that the Determination should be varied or cancelled, or a matter or matters referred back to the Director, for reason of an error or errors in fact or in law.

FACTS

The parties imagine many issues and their submissions therefore touch on a great many topics. I find, however, that much of what they claim is of no importance to the issues raised by the appeal. It is the following that I find relevant.

CEI is an employment placement agency. Natalie Marin worked for CEI as a personnel consultant, a position which is often described as that of a “head-hunter” in this day and age.

A written contract of employment is governing. The contract provides for the payment of two different kinds of commissions, “5 percent recruitment commissions” and “40 percent placement commissions” (what I will also refer to as the “placement commission”). The percentage paid in the case of each commission is a percentage of the finders fee which CEI receives when a person is placed with a client.

The 5 percent recruitment commission is paid out to the personnel consultant that found the successful job applicant in the first place.

“all resumes solicited by the consultant regardless of location will be flagged and entered into our database. When these candidates are placed, a 5% commission will be paid out for that resume entry. This commission is paid for candidates that you have directly recruited, interviewed, referenced and subsequently added to the Campbell, Edgar database. Commission will be paid out ... regardless of who made the placement, and when it takes place.”

The 40 percent placement commission is paid to the person or persons who is (are) responsible for the placement. If more than one consultant was instrumental in placing a person with a client, the contract and the employer’s *Operations Manual* call for the placement commission to be split.

If one consultant supplies another with a new recruit while that second consultant is conducting an active search for persons to fill a particular job, the consultants are to receive an equal share of the placement commission. The contract of employment provides for that.

“... contributing a new recruit to another consultant’s active search that is ultimately hired for the position, the fee will be split, with a placement fee equal to 50 % of your normal commission paid to you. Should a candidate be terminated within the prescribed guarantee period -- the responsibility for replacement will be joint, however, the final responsibility lies with the company.”

Where consultants work together as a team, sharing in the work, there may also be a splitting of the placement commission. But in cases where there is simply a sharing of the work, the split is not necessarily fifty-fifty. The consultants can do as they see fit, through an agreement to split the placement commission. And, according to the *Operations Manual*, the President may also decide that the placement commission should be split on a basis other than fifty-fifty.

“Upon review of participatory levels of the consultants involved with respect to interaction with the successful candidate and the client on a given order, the commission split may be adjusted to a ratio other than a 50/50 split by the President after discussion with the parties involved.”

The above wording indicates that, where there is simply a sharing of work, the placement commission is to be split fifty-fifty unless the President decides otherwise after holding a discussion with the consultants and after considering the extent to which the consultants worked with the successful candidate and the client. On hearing from the parties, however, I find that in fact it is clearly understood by the parties that the President would split commissions where there was simply a sharing of the work on one basis and one basis alone, namely, according to the extent to which each consultant worked with the successful candidate and worked to place a person with the client. Hay, Marin and a witness, KA, all speak as if it is only that which is to be considered by the President if commissions are to split on a basis which is not fifty-fifty.

JM's Placement

JM is the person placed with FF.

FF decided that it would hire a district manager and it sought the assistance of CEI. Marin was assigned to the file. Marin selected three persons from CEI's database for FF to interview. Hay directed Marin to add JM to her list of interviewees as she thought that JM would be perfect for FF. Marin did not know of JM before that point.

Marin assembled all four of the prospective candidates for interviews. On interviewing the four, FF expressed an interest in a young candidate known only as Tanya but it later decided against hiring her. It did not at that point indicate that it had any interest in any of the other candidates. I find, moreover, that JM had no real interest in going to work for FF at this point as she had discovered that the job that FF was at that point offering was that of a junior manager and it did not pay enough.

Marin submitted her resignation and left the employer.

Hay, herself, contacted FF. She suggested that FF consider JM for a more senior position and FF did just that. It interviewed JM a second time and, on doing so, it hired JM as its regional manager.

CEI has not paid Marin any amount of commission for JM's placement. Hay decided against doing so on the basis that the only reason that JM was placed was because of what she, herself, had done. I find as a matter of fact, however, that she did so without any consultation with Marin and that her decision fails to consider the extent to which Marin worked with the successful candidate and worked to place a person with the client. That is obvious as it is clear and obvious to me that Marin worked with the successful candidate and, most importantly, that she went to great efforts to place a person with the client.

The Director's delegate, in explaining the Determination, has found that the terms of contract do not address the JM situation precisely and that it is "unfair to deny Marin's commission entirely, especially (since) FF hired the same person Marin had recommended". He then goes on to award her $\frac{3}{4}$ of what is estimated to be the amount of the 40 percent placement commission for placing JM. An estimate is used because CEI did not provide the delegate with information to indicate what the exact amount of the commission would have been.

On hearing from the parties, I find that the delegate's estimate is low by quite a margin. CEI's placement fee for placing JM is not 20 percent of \$50,000 but in fact 20 percent of \$62,000 or \$4,960.

ANALYSIS

Commissions are wages. That is clear from the *Act's* definition of the term "wages".

"wages" includes

- (a) salaries, commissions or money, paid or payable by an employer to an employee for work,

If commissions are owed, then they should have been paid.

- 18** (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.
- (2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

This is not a question of what is fair but what, if anything, is owed under what are the terms of Marin's employment. It is clear to me that they do cover the circumstances of JM's placement.

In my view, Hay became, in effect, a consultant. She introduced JM to Marin and I find that, in doing so, she in effect contributed "a new recruit to another consultant's active search", that being Marin's search for a manager for FF. Given that fact, the fact that JM was eventually hired by FF and, of course, the contract, it follows that Marin is not entitled to $\frac{3}{4}$ of the placement commission. She is, at the most, entitled to half of the 40 percent placement commission for JM.

There is no denying that Marin both worked with the successful candidate and worked to place a person with the client. The latter includes, of course, all of the work that she did with the three other candidates that were interviewed by FF. It does not necessarily follow from the mere fact that Marin was involved in JM's placement, however, that she is owed the remaining half of the 40 percent placement commission. The President of CEI can decide otherwise if the matter is discussed with the consultants involved and it is found that there was not an equal sharing in the work. Failing that, the placement commission is to be split fifty-fifty.

Hay is not entitled to the entire amount of the placement commission because she is the person that was ultimately responsible for the placement. Her decision is unilateral, unfair and entirely self-serving. If, as here, there was a sharing of the work, the commission is to be split fifty-fifty or it may be according to the extent of each consultant's involvement if there are certain discussions. The necessary discussions never took place. And clearly, Marin is entitled to at least some amount of commission because of the fact that she did work with the successful candidate and because of all the work that she did in an effort to find FF a manager.

I cannot sustain a decision which awards Marin $\frac{3}{4}$ of the 40 percent placement commission as it is clearly inconsistent with what are the terms of Marin's employment. Yet I will only reduce the amount of placement commission which CEI must pay to where it is half of what is the correct amount of placement commission. Only that is consistent with the *Act's* purposes, the following in particular:

- (b) to promote the fair treatment of employees and employers;
- (c) to encourage open communication between employers and employees; (and)
- (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;

Half of the 40 percent placement commission is \$2,480 [.5 of (.4 x 20 percent of \$62,000)]. To that must be added 4 percent vacation pay (\$99.20) and interest.

FACTS REGARDING THE DEDUCTION

SF was, in essence, recruited by KA even though Marin helped KA prepare the final resume for SF.

Marin did not pluck SF from the employer's database. KA introduced Marin to SF. And I find that the introduction was during the course of Marin's search for a person who would fill the needs of S, albeit she was in the initial stages of that search. Marin herself tells me that it was KA that "brought the name forward and I would not have known (SF) otherwise ...".

SF was placed with S and at that point Marin told Hay that she was entitled to receive the entire 40 percent placement commission and KA was entitled to 5 percent recruitment commission.

That appears to have been a genuinely held belief based on her work with the successful candidate and the client. It is clear to me that it was Marin that did almost all of the work.

KA was travelling abroad when the commissions for SF's placement were paid out by the employer. On checking on what she had been paid in the way of commissions for SF's placement, KA discovered that she had only been paid 5 percent recruitment commission. That led her to call Hay. She complained of the fact that she had only received 5 percent recruitment commission and argued that she was entitled to half of the placement commission.

Hay reviewed matters immediately and decided that the placement commission should have been split fifty-fifty. CEI paid KA half of the 40 percent placement commission and it deducted \$1,330 from Marin's next paycheque. That amount is half of the placement commission which is due for the placement.

According to Hay, once matters were explained, Marin agreed to a fifty-fifty split. I find that Hay did not meet with Marin and explain matters as is claimed, nor do I find clear evidence of an agreement. I am shown that Marin had already left CEI by the time that KA called to complain about her commissions. And I am led to believe that Marin was completely surprised to find that \$1,330 had been deducted from one of her paycheques.

It is the delegate's conclusion that the employer made a mistake and the mistake is a business cost, although the latter is not explained. It is also the conclusion of the delegate that the deduction is contrary to section 21(1) of the *Act*.

ANALYSIS

Marin did the bulk of the work in placing SF with S. Indeed, from what I can see in regard to work performed, KA did very little to place a person with S. It was, however, KA that introduced Marin to successful candidate and it is clear to me that she did so while Marin was actively searching for a person for S. As such, for reason of the contract Marin is entitled to only half of the 40 percent placement commission. KA is entitled to the other half because she contributed "a new recruit to another consultant's active search that is ultimately hired for the position".

CEI made an error when it paid Marin the entire amount of the placement commission owed for SF's placement but it was an honest mistake. Only Marin was around at the time. And Marin merely conveyed what she firmly believes, namely, that she is due the entire placement commission because she had performed the bulk of the work.

While it is clear to me that Hay could have handled things better, that in itself does not entitle Marin to the payment of any moneys under the *Act*. I have found, moreover, that CEI has done nothing more than overpay Marin through a series of honest mistakes and that it acted to correct its mistake immediately on discovering its mistake and deducted \$1,330 from Marin's

paycheque. According to the delegate, that deduction is contrary to sections 21 (1) and 21 (2) of the *Act*.

21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

(2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

Mistakes are inevitable. And mistakes are, to a large extent, just a part of being in business. It is not made clear to me, however, how or why the employer in this case must swallow the amount of the overpayment as if it were just a cost of doing business, nor that the deduction is contrary to section 21 (1) of the *Act*. It is not as if the employer is attempting to drag up some old mistake of which it has known about for months or years. As soon as the employer discovered the error, it acted to recover the amount which was paid out in error.

In *492695 B.C. Ltd. (c.o.b. Paloma Polynesian Bar and Restaurant)*, BCEST No. D139, one of my fellow adjudicators had this to say in regard to overpayments and whether deduction of the overpayment is or is not contrary to section 21 of the *Act*.

“The *Act* is remedial, not punitive. One of its purposes is to ensure that employees receive the full measure of wages to which they are entitled. Section 21 of the *Act* safeguards this purpose by restricting the circumstances in which an employer may deduct monies from an employee's pay. One of the exceptions as a matter of practice is with respect to overpayments of wages. The *Act* does not require the Company in these circumstances to satisfy the same wage entitlement twice. Accordingly, the Company is entitled to have any overpayment of vacation pay taken into account in determining the amount owing to the complainants.”

I agree with the above. I would add, moreover, that it does not seem to me that moneys paid in error are wages at all but moneys which are separate and distinct from wages in that they are not due and payable for work performed. CEI has not, in my view, withheld, deducted, or required the payment of wages but moneys to which the employee was never entitled to in the first place.

In summary, I find that Marin is not owed $\frac{3}{4}$ of the placement commission which is due for the placement of JM but half of the placement commission plus vacation pay and interest. I find that the placement commission is not as estimated by the delegate but \$4,960. And lastly, I find that the deduction of \$1,330 from Marin's pay is not contrary to the *Act* and that CEI is not required to pay that amount to Marin.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated October 31, 2000 be varied. The amount which CEI must pay Natalie Marin is \$2,579.20 plus the interest to which she is entitled to under section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal