

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Pacific Shores Nature Resort Ltd.
("Pacific Shores" or "employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE No.: 2000/174

DATE OF HEARING: July 24, 2000

DATE OF DECISION: August 11, 2000

DECISION

APPEARANCES:

Susan Pearson, for Pacific Shores Nature Resort Inc.

Shelly Prpich

Martha Rans for the Director

OVERVIEW

This is an appeal by Pacific Shores Nature Resort Ltd. (“Pacific Shores”) of a Determination, dated February 21, 2000. Pacific Shores claims that it is entitled to deduct credit card charges from a bonus payable, and pay a bonus calculated monthly based on the difference between commissions paid and wages received. Pacific Shores further alleged that the Director erred in a calculation related to statutory holiday pay, and a bonus in respect of a sale.

ISSUES TO BE DECIDED

Can an employer deduct credit card charges from a bonus payable, which is based on commissioned earnings?

Can an employer enter into a contract of employment with an employee which provides for a bonus paid on the difference between commissioned sales and minimum wages?

FACTS

Shelly Prpich was employed as a sales person with Pacific Shores Nature Resort Ltd. (“Pacific Shores”) between 1998 and 1999. She sold deeded timeshare interests in the vacation properties owned by Pacific Shores in Parksville. Pacific Shores, or its telemarketers or agents, would arrange for “tours of the property” by prospective customers. When customers came in, Ms. Prpich, one of a number of sales employees, would conduct a meeting to attempt to sell the customer a time share interest in the property. Ms. Prpich is a skilled and experienced salesperson.

The employer considers that Ms. Prpich is performing sales duties when she attends at the work place and performs sales related duties, even if Ms. Prpich does not sign up a purchaser on closing documentation for a time share interest in Pacific Shores.

The timeshare market is a competitive market, and in order to retain employees the employer must provide for a competitive remuneration package. I accept that in British Columbia, employees may not sell the time share interests on a commission basis, unless they are licenced real estate agents. This is by virtue of the *Real Estate Act*. The industry practice, according to

Ms. Pearson, an owner of Pacific Shores, and a manager at Pacific Shores, is that commission sales is the common method of remunerating sales people in jurisdictions outside of British Columbia. An employer within British Columbia, is governed by British Columbia legislation, regardless of the industry practice or competitive nature of the extra-provincial market place.

An important factor is the nature of the product sold. The timeshare interest is subject to a prospectus. There is a 7-day rescission period, where the customer can rescind the transaction. Each transaction involves a relatively large amount of money \$10,900 to \$20,900 (Exhibit #1). There can be a long delay in the payment of the sale price, as customers frequently have vacation plans for the present year, when they attend the sales meeting. The sale price appears to be rarely paid at the sales meeting. These characteristics distinguish the product or industry from the usual commissioned sales cases which proceed before this Tribunal.

I accept that the nature of this business is that a sales employee must do her best to attempt to close a deal while the customer is on the property, during the tour. The sales person attempts to close a sale, by obtaining signatures on contracts, and obtaining a deposit. The sales person strives to avoid leaving the transaction in a state where a potential customer will “be back” to purchase. During the sales interview the salesperson attempts to identify the barriers to an immediate purchase, and the needs of the purchaser. The salesperson attempts to overcome the customer’s resistance by offering an inducement which is persuasive to the customer. The PACT is a source of funding, about 10 % of the value of the interest sold, that can be used, all or in part, to induce a sale. There are a variety of inducements that a sales person can use to encourage a sale. These include the use of cash, or cash equivalents presented to the customer in various forms that attempt to overcome the customer’s resistance to “buying now”. For example, the salesperson can offer free weeks of accommodation, payment of a number of payments towards the cost of a time share interest, payment of airfare to attend the sales meeting, payment of airfare for the first holiday at the property, reducing the cost of purchase for a “cash” transaction.

Ms. Prpich commenced her employment on or about September 9, 1997. She worked until February 22, 1999. She signed a written contract of employment on September 12, 1997. She claims that she did not read the contract before signing it. All 4 pages of the contract are initialed by her. She alleges that she did not understand the agreement until it was explained to her a short time later (less than two months later) by her husband.

I do not accept her evidence on this point. Ms. Prpich is a sophisticated salesperson. She was selling a product covered by a prospectus. It was her job to explain to the customers the sales documentation as it was being signed. She was somewhat evasive in her answers to questions that related to acceptance of the terms of employment set out in the employment contract. I find that she accepted the offer presented to her when she signed the document. Further, I find an acceptance by conduct, in her performance of the duties of a salesperson, after her husband fully explained the agreement to her. In my view, it is unnecessary for an employer to suggest that an employee obtain independent legal advice before an employee signs an employment contract. This clearly is not a fact pattern where one can say that the contract is unconscionable or that there was duress placed on the employee to sign the contract. Ms. Prpich signed the contract shortly before the cut off for the first pay period. If she chose not to read the contract before signing, which I do not accept, that is not a factor which persuades me that the contract is not enforceable.

In the first pay period, Ms. Prpich did not generate any sales. She alleged that the minimum wage of \$42.00 paid in the first pay period was “clawed back” in the second pay period. She further alleges that similar “claw backs” were made on the April 30th pay period in the amount of \$466.60, and in the June 30, 1998 pay period in the amount of \$509.44, and in the February 15, 1999 pay period in the amount of \$151.41.

The Agreement:

The agreement provides for compensation as follows:

Wages shall be at \$7.00 per hour plus bonuses earned. Bonuses will be paid according to the Schedule of Renumeration attached.

It is apparent that by paying wages of at least \$7.00 per hour, the employer is in compliance with the *Act*. I note that there is no suggestion in this case that the employee has not received at least \$7.00 per hour for all hours worked.

The agreement further provides:

The amount of bonus payable shall be calculated by totaling the volume and pact calculations, on the following scales, less the amount of the cumulative wages previously earned by that employee during their employment at Pacific Shores.

Volume Calculation:

For the first 90 days of employment at 7.6923% of the selling price of the timeshare, less any cash disbursements made on the sale as determined by the standard company policy.

Pact calculation:

at 24.0386 % of the allowable Pact , based on standard corporate policy in effect at the time of sale. Pact available on individual weeks is at the sole discretion of the company, and may vary on a daily basis.

...

Running totals of the Maximum Volume Credits and Pact Bonus Credits will be kept. The Bonus paid to the sales person will be the amount of the running total, less the amount of wages already paid. Bonuses are paid only for sales volumes in excess of the hourly wages paid, on a cumulative basis.

Wages will be paid on the Payroll dates of the 15th and last day of each month. Sales Bonuses for cash sales are considered due and payable when the sales has closed, and the company has received funding from the notary by noon of the day previous to payroll date.

Credit Card Charges:

The Delegate found that on a number of sales transactions the employer reduced the bonus by subtracting a credit card charge. The Delegate found this to be a violation of s. 21(2) of the *Act*.

The evidence of Ms. Pearson is that the sales employees were advised that it was the employer's policy that credit cards should not be used, except for deposits, and then only to a limit of \$2,000. This evidence is contradicted by the evidence of Ms. Prpich. She indicated that the sales manager, Tony Walker, often asked the customers to see their credit card, and asked how much they would like to put on their credit card. Mr. Walker was not called as a witness by Pacific Shores. Ms. Pearson did not deal directly with the sales staff, and may not have been fully aware of the practices encouraged by Mr. Walker. The evidence before me leaves me with the impression that the sales process is fluid, and there is intense pressure on the employees to produce. Non-producing employees were terminated. The employees were encouraged to use a variety of strategies to overcome customer resistance. I therefore prefer the evidence of Ms. Prpich that credit card use was encouraged by the employer as a method to induce a sale. I note further, that the employer had no written policy concerning the acceptance of credit card payments by employees, and the employment contract is silent on the issue of acceptance of credit card payments.

ANALYSIS

In an appeal before the Tribunal, the burden is on the appellant to demonstrate an error such that I should vary or cancel the Determination. The appellant alleges the Delegate erred in finding that:

- (a) Ms. Prpich was not paid the Stone/Brulee commission in the amount \$413.50;
- (b) Ms. Prpich was entitled to statutory holiday pay for New Years 1999;
- (c) the employer was not entitled by agreement to deduct credit card charges from the bonus otherwise payable;
- (d) the employer was not entitled by agreement to pay a bonus based on comparing the wages already paid to the commission sales made;
- (e) statutory holiday pay was to be calculated at a rate of 1.5 %.

There are two errors in the Determination, which are conceded by Director's counsel. The first error relates to a commission paid in respect of the Stone/Brule sale. The Delegate found Ms. Prpich was entitled to a closing bonus of \$413.50. At the time of the investigation, Ms. Pearson was unable to locate the canceled cheque. Ms. Pearson produced a canceled cheque for this commission, and a copy was filed at this hearing as Exhibit 7. The Determination will be varied to reduce the amount owing by \$413.50. The second error relates to a claim for statutory holiday pay for New Years Day 1999 of \$267.73. Ms. Prpich agrees that she did not work this day, and therefore there is no entitlement to the sum of \$267.73. The Determination will be varied to reduce the amount owing by \$267.73.

The Bonus:

There was substantial argument that the bonus as defined in the agreement was unclear, and the agreement should be construed against the employer. If the bonus scheme as defined in the agreement is not enforceable because it violates the *Act*, it is my view that the bonus clause completely fails, and the employee is paid minimum wage only. It is not open to the Delegate to re-write the contractual arrangement between the parties to provide for a minimum wage at \$7.00 per hour, and a bonus based on a percentage. This is not what the parties agreed. I find that the bonus clause is clear, the real issues are whether the employer may deduct credit card charges from the bonus otherwise payable, and whether the employer may calculate a bonus by comparing a percentage of the sales receipts generated by the employee, to the monies previously received by the employee on account of wages, and top up the minimum wages of the employee.

Deductions for Credit Card Charges:

The employer argues that the agreement clearly provides for a bonus which can be reduced for credit card charges. The employer says that use of the credit card is within the control of the salesperson, and that the use of a credit card by a customer reduces the profitability of a sale. The employer says that it recognizes that for deposits a credit card charge for a deposit of up to \$2,000, is a cost of doing business. The employee argues that the employer wanted sales, and encouraged the use of credit cards, when necessary to induce a sale, and that the bonus should not be reduced because of credit card charges. Counsel for the Director argues that credit is a cost of business, and it is open to the employer to regulate how credit is granted within the business. The Director argues that the use of credit cards is a cost of business, no matter what amount the customer chooses to place on his or her account. The Director points out that s/ 21(2) of the *Act* prohibits an employer from requiring an employee to pay any of the employer's business costs except as permitted by the regulations. The Director says that credit card charges are not a cost permitted by regulation.

In my view a bonus is included within the definition of "wages" set out in s. 1(b) of the *Act* as money paid to an employee as an incentive that relates to production. An employer cannot evade s. 21 of the *Act* by attempting to characterize this bonus as "profit sharing", and deduct the costs that relate to profitability from the bonus. I make these comments in relation to the particular fact pattern in this case, only, where the employer has tied the incentive for productivity to completed sales, and not profitability of the employer, generally.

The use of credit cards is a widespread fact of commerce in the business world. The employer has a contractual relationship with the entity who grants credit cards. The purchaser may obtain some benefit by use of the card, and the employer certainly receives the benefit of the sale, albeit the profitability is reduced by charges associated with the customer's use of the card. The employer can by policy, control or regulate the acceptance of credit cards. It is open to the employer to limit the amount which can be charged by its clients. The employer is the person who gives directions in the workplace concerning use of credit cards. Credit is the employer's cost of doing business.

The employer's manager, Tony Walker, encouraged the use of credit cards as a method of increasing the volume of sales. This was beneficial to the employer, but perhaps not as profitable as a non-credit card transaction. An employer cannot pass on the costs of doing business to its employees. This is forbidden by s. 21 of the *Act*. I find that the Delegate did not err on the credit card issue. The employer cannot reduce the bonus by subtracting its credit card charges. The contractual language does not clearly state that the volume or PACT is reduced by credit card charges. If the employer sought to rely on a contract setting this point out expressly, the contractual provision would be of "no effect" as provided by section 4 of the *Act*. In summary, in this case the employer cannot deduct credit card charges in calculating the bonus payable to the employee.

The Minimum Wage:

The Director's Argument:

The Director says that the method of calculating pay on a rolling balance is not permitted by the *Act*, as the wages must be paid in the pay period earned. The proper method of calculation is to look at the pay period. The Director says that the employer has clawed back the minimum wage paid in a pay period, and this is not permitted by the *Act*. The Director says that this is an important point, as the employees are working whether a sale is made, and the employee should not be penalized by reducing the compensation payable when a sale is made. The Director urges that a liberal and remedial interpretation should be given, consistent with the approaches set out in *Rizzo and Rizzo Shoes Ltd, (1998) 154 D.L.R. (4th) 193 (SCC)* and *Machtlinger v. HOJ Industries Ltd, [1992] 1 S.C.R. 986 at 1002*. The Director says that protection of the minimum wage is essential to the *Act*.

In order to determine whether the employer is in violation of the minimum wage provisions of the *Act*, one must look at the contract, as well as the statutory provisions.

The agreement provides for compensation as follows:

Wages shall be at \$7.00 per hour plus bonuses earned. Bonuses will be paid according to the Schedule of Remuneration attached.

It is apparent that by paying wages of at least \$7.00 per hour, the employer is in compliance with the *Act*. I note that there is no suggestion in this case that the employee has not received at least \$7.00 per hour for all hours worked.

The agreement also provides sample calculations on page 2 which illustrate clearly that a bonus is not paid unless the commissions exceed the minimum wage, and then a bonus is paid to the extent that the commissions exceed the minimum wage.

Ms. Prpich, Delegate and Counsel for the Director have characterized this as a clawback of the minimum wage. Counsel says that this is a violation of s. 16 and 17 of the *Act*.

Section 16 An employer must pay an employee at least the minimum wage

Section 17 At least semi-monthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

In the Determination the Delegate states that the minimum wage cannot be offset or clawed back against future commissions. With respect, I think this is not what the contract does. The employee always receives a minimum wage, even if the efforts of an employee do not produce any sales. Under the agreement, the employee does not receive the minimum wage and a commission from the sale based on a fixed percentage of the sale. I think it is certainly open to an employer to pay minimum wage and a fixed rate of commission, if the parties have contracted for this method of remuneration.

The parties have not contracted for this method of remuneration. The parties have contracted for a minimum wage paid irrespective of results, and a bonus which is defined based on results. The employee may receive a bonus, at the time when the sale proceeds are realized, if the employee's performance justifies a bonus. The performance is measured by comparing a percentage of the sales proceeds to the wages earned, and if the percentage of the sale proceeds exceeds the wages earned the minimum wage is topped up. Applying the formula it is apparent that the employee's remuneration varies with sales proceeds received, and that the bonus may well exceed the guaranteed minimum wage.

The scheme in this contract provides for the employer to assess at the time when the customer pays the sale price, whether the employee is entitled to an additional bonus. The employee has already been paid for the work she has performed in each pay period by virtue of receipt of the minimum wage. The Delegate erred in this case by failing to consider when the bonus was earned. There seems to have been an implicit assumption that the bonus was earned when the sale was made. In order to determine when the commission is earned, one must consider the terms of the contract. The bonus is earned when the parties agree it is earned, in the absence of any agreement, that date is likely the date of sale. Here there is an express agreement between the parties that the bonus is earned when the company receives funding from the notary by noon of the date previous to payroll dates of the 15th or last day of the month. In my view this is sufficiently clear. Because the bonus is not earned until the sale completes, there is no issue of claw back, it is simply a calculation as to whether during that pay period the employee is entitled to additional monies above the minimum wage already received.

I was referred to *Sommerfeld*, BC EST #D153/97. The employee received a draw of \$1,000 per month, which was less than the minimum wage. In this case, the Adjudicator held that the employer must pay the minimum wages due and owing, and one must consider this on a pay period basis. I was also referred to *Cynatec*, BC EST #D177/97. In this case the employee was retained on a commissioned basis, and made no commissioned sales during the period of employment. The employee was entitled to the minimum wage. This decision is correct, but does not apply to the facts of this case. I was referred to *Fabrisol Holdings Ltd.*, BC EST #D176/96. This case dealt with a fact pattern where the Delegate found that the commissions were due and payable when a sale was made. The employer was not permitted to pay the wages

one month after the date of the sale. The *Fabrisol* case is distinct from the facts in this case, as unlike *Fabrisol* the sales person is not entitled to a bonus until the sale completes by the payment of money. I note that a further distinguishing factor is that there is a statutory rescission period on the produce sold in this case, it is not apparent from *Fabrisol* that there is any rescission period. *Superior Beauty Supplies*, BC EST #D581/97, dealt with a situation where the employer kept inadequate records, and therefore could not establish any error with regard to the failure to pay minimum wage. In *Primco (PWL) Ltd.*, BC EST #D144/97, the employer paid commissions the month following the date of sale of wholesale flooring materials. The Adjudicator held this to be a violation of s. 16 of the Act. I note that the Delegate found that the commissions were earned when the sale was made, and therefore payment of commissions the following month, was a violation of s. 16 of the Act. I note that *Primco* does not deal with a situation involving a product subject to a “rescission period”, nor did it deal with a case where the commission entitlement arose only after payment by the customer.

I also was referred to *Steve Marshall Ford*, BC EST #D382/99. This case involved commissioned salespersons. The Adjudicator noted that the requirements of the *Act* must be met for each pay period. The Adjudicator noted that there was no arrangement approved by the Director to average pay over a period longer than a pay period. The Adjudicator further noted that “... when commissions become payable depend on the terms of each employment contract. However, employers must still pay employees’ wages semi-monthly.”

In this case, we are not dealing with an employee who worked a number of hours, who did not receive the minimum wage. In my view the agreement does satisfy the minimum provisions of the *Act*. An employee who produces no sales which complete will receive at least the minimum wage. This is clear from the agreement. A salesperson who produces more gets paid more.

In my view, there is no violation of s. 17 of the *Act* because the bonus is not earned at the time of the sale, it is earned when monies are paid to the employer by the notary, and when the “bonus account”, exceeds the “minimum wage account”, measured from the date of employment. The bonus is not earned until the “sale completes”, that is when the funds have been received from the notary public, at least one day before the specified payroll dates. When the sale completes the employer then compares productivity e.g. the amount by which the commissions exceed the minimum wage, and then pays, or does not pay, an additional sum of money. At no time is the employee required to disgorge any funds previously paid on account of wages, the employer simply calculates whether during that pay period, productivity is such that the employee is entitled to a bonus. In my view it is not accurate to state that this agreement deprives an employee of the minimum wage.

This is an unusual method of calculating compensation, however, the *Act* deals in minimum standards. As long as the employee is paid at least the minimum set by *Regulation* for the hours worked, the legislative intent is met. There is freedom for employers and employees to design compensation schemes which meet the needs of the parties.

Calculation of Vacation Pay:

The employer's position with regard to vacation pay is confusing. The employer concedes that it erred in the calculation of the vacation pay, but it also suggests that the Delegate erred in the calculation of vacation pay. The employer suggests that the proper method of calculating vacation pay is set out in *Motion Works Group Ltd*, BCEST #D345/96. I note that *Motion Works* deals with an issue related to overtime calculations. I see no error in the method used by the Delegate to calculate vacation pay. It is apparent from the pay stubs given to the employee, and the evidence of Ms. Pearson and Ms. Prpich that no separate amounts were set out on the stub and paid to Ms. Prpich. The contract between the parties does not set out any method for dealing with vacation pay, other than a statement that Holiday pay will be paid in accordance with the Employment Standard *Regulations*. There was no evidence before the Delegate that the employer complied with the *Regulations*. The employer has failed to establish any error with regard to vacation pay.

In summary, I confirm that the Delegate correctly found that commissions could not be reduced by subtracting credit card charges. I find that the Delegate erred in finding that the employer "clawed back the minimum wage". I find that the Delegate applied the correct principles in calculating the holiday pay. The parties have agreed that the Determination must be varied to reduce the amount owing by the amount paid on account of the Brulee commission, and the amount of the January 1, 1999 statutory holiday pay. I also ask that the Delegate review the calculations of vacation pay to determine whether the vacation pay calculations must be adjusted in light of my finding that the bonus is not earned until the price is transmitted by the employer's notary to the employer. Otherwise I confirm the Determination.

ORDER

Pursuant to section 115 of the *Act*, I refer this matter to the Delegate for a re-calculation of the Determination based on the following findings:

- (a) the Stone Brule commission of \$413.50 was paid by the employer to the employee;
- (b) the employee did not work on January 1, 1998;
- (c) the bonus was calculated accurately with regard to the 2nd pay period, April 30th pay period, the June 30, 1998, and the February 15, 1999 and the Determination must be reduced by the sum of \$42.00, \$466.60, \$509.44, and \$151.41.

As the vacation pay entitlement may be affected by the reduction of the Determination, I also refer this matter back for a re-calculation of the vacation pay entitlement.

Paul E. Love
Adjudicator
Employment Standards Tribunal