

An appeal

- by -

Cliff Turick
("Turick")

- 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: Cindy Lombard

FILE No.: 2001/207

DATE OF HEARING: June 15, 2001

DATE OF DECISION: June 26, 2001

DECISION

APPEARANCES:

Cliff Turick on his own behalf

Wendy Love, Payroll Administrator on behalf of Don Folk Chevrolet Oldsmobile Inc.

OVERVIEW

This is an appeal by the employee, Turick, pursuant to Section 112 of the Employment Standards Act (the “Act”) of a Determination which was issued February 16, 2001, finding that:

- 1) the employer, Don Folk, had paid all commissions and bonuses due to Turick during the period of his employment.
- 2) Turick was not entitled to any compensation in lieu of reasonable notice.

ISSUE

1. Is the Appellant, Turick, due commission and bonus wages earned during his period of employment with Don Folk?
2. Is the employer, Don Folk, liable to pay compensation in lieu of reasonable notice to Turick pursuant to Section 63(3)(c) of the Act?

The onus is on the Appellant, Turick, to show on a balance of probabilities that the Determination is wrong.

FACTS

The employee, Turick, was employed by Don Folk as a car salesman from May 6, 2000, until November 30, 2000.

The employer, Don Folk, says that Turick was dismissed when he returned from an unauthorized holiday.

Turick was paid \$1,000.00 per month plus commission payable as follows:

- a) \$150.00 for each of the first eight vehicles sold in a month;
- b) \$200.00 for the ninth to twelfth vehicles sold;

- c) \$500.00 bonus if eight vehicles were sold in a month;
- d) “spiff”s, i.e. bonus related to a specific promotion

1. Is the Appellant, Turick, due commission and bonus wages earned during his period of employment with Don Folk?

Turick says that he is due commission on the following deals for which he was never paid by Don Folk:

A. 1999 Aurora Sale

Turick says that an \$800 “spiff” was due to him on this deal but he was only paid \$600.00, a shortfall of \$200.00. The Director supported Don Folk’s contention that the “spiff” due was \$600.00 and Don Folk’s records indicated that this sum was paid to Turick in July, 2000.

Kantola gave evidence that he was employed as a salesman with Don Folk until mid-June, 2000. According to Kantola, the “spiff” due on the sale of the 1999 Aurora was \$800.00 not \$600.00

The witness on behalf of Don Folk, Wendy Love, had no personal knowledge of the amount of the “spiff” on that particular vehicle.

We find that Turick has not discharged the onus of showing that the Director’s finding that the “spiff” was \$600.00 is wrong. We note that although Turick was paid \$600.00 for the “spiff” in July 2000, he did not complain about the amount paid until following his dismissal several months later.

B. The Bailee Deal

In this case, Turick says that there was a dispute between he and the General Manager, Frank Pizzuto (“Pizzuto”) as to whose deal it was. Both men had worked with the customer. The commission was paid to Pizzuto and Turick says that he was promised a “house deal” which would mean that not only would he be paid the \$150.00 commission but also it would have been his eighth deal of the month entitling him to the \$500.00 bonus for a total of \$650.00 outstanding.

Jason Jones, CGA and Controller on behalf of Don Folk, stated to the Director and to the Employment Standards Tribunal in a letter dated March 19, 2001, that it is company policy not to give “house deals”.

However, the evidence of Turick’s witness, Kantola, who stated that he received two or three “house deals” during the period of his employment (from October 4, 1999 until

mid-June 2000) and Wendy Love (who gave sworn evidence that a few “house deals” are in fact given) support a finding that on an infrequent basis “house deals” are given by Don Folk where it is difficult to determine which salesperson is due the commission.

In the case of this deal, I find that the evidence of the Appellant was credible and that he is due:

a)	Commission of	\$ 150.00
b)	Bonus for the 8th deal of the month	<u>\$ 500.00</u>
		\$ 650.00

C. The Osmic Deal

According to Turick this was a case where he made the initial contact with the customer. When the customer returned, he could not remember who he had dealt with so another salesman, Jamie Wheeler, completed the deal and was paid the commission. Turick says that frequently a customer cannot remember the salesman’s name and the procedure is therefore to ask “have you been here before?” and if one cannot recall the salesman’s name, they are showed photographs on the wall of all salesmen. At the time of this deal, Turick’s picture was not up because someone had defaced it.

The Director supported Don Folk’s position based on the evidence of Pizzuto, who advised the Delegate of the Director that Turick was given a deal that Pizzuto had in fact delivered – a 2000 Camaro in lieu of the Osmic deal. The Delegate verified that a deal for a 2000 Camaro is listed on Turick’s monthly summary for the month of September, the same month of the Osmic deal.

We find that Turick has not discharged his onus of showing that the Determination on this deal is wrong.

D. The 1-Ton Deal

Turick says that he is due the commission of \$150.00 on this sale.

In the Determination the Delegate of the Director says that she was advised by Don Folk that they had no record of a 1-ton diesel having been sold, and further that there was not even one in stock. Don Folk said there was a 1-ton ordered for stock prior to October 6, 2000, by the Fleet manager but it had not arrive prior to Turick’s dismissal.

Turick says that on approximately November 25, 2000, he wrote up a sale of a 1-ton to a customer, “Chan”, and that he received a deposit of \$500.00. Turick says that he left his copy of the sale documents on his desk when he left on holidays. After the sale was

approved in the business office, he recorded the sale as is the procedure in the Daily Transaction logbook.

A photocopy of the logbook for November 28, 2000, forwarded by Don Folk to the Tribunal office in January 2001 shows a sale to a customer, Chan, of a “CK3500” which Turick says (and this was confirmed by Wendy Love) denotes a 1-ton diesel truck.

Wendy Love produced a Receivables List for November 2000, which shows all monies received no matter what the method of payment including by credit card. Love did say that it is possible that the deal was not recorded until December, however, the December records were not produced.

We found the Appellant, Turick’s evidence on this deal credible and the evidence of Don Folk on this point lacking, and therefore find that Turick is owed \$150.00 for the 1-ton deal.

E. Jesse James Trucking Deal

In this case, the Delegate of the Director found there was never a sale completed and delivery of the truck by Don Folk to Jesse James. Rather, Don Folk sold the ¾-ton truck to GMAC and Don Folk’s Fleet Manager, MacDougall, received a commission.

Turick says that he spent a lot of time with James over a three-week period. Because of financing it was arranged that the truck would in fact be purchased through GMAC.

Don Folk agrees that Turick spent time with James with respect to the sale but says that James was upset with Turick and the business office for not having the paper work done. In his letter dated March 19, 2001, Jason Jones for Don Folk says that the GMAC dealership purchased the truck and that there is no evidence that the truck ended up in James’ possession.

Love, on behalf of Don Folk, gave evidence that James did go to Chrysler because he could not finance through Don Folk. Given that there is no dispute that Turick was the salesman who dealt with James, it is consistent with Don Folk’s usual commission policy that Turick not McDougall should receive the commission of \$150.00. Turick says that this deal was the eighth of the month and that he should therefore receive the \$500.00 bonus. There was no evidence presented by the employer either to the Delegate or at the hearing that this was not the eighth deal of the month and Turick is therefore entitled to \$650.00 with respect to the Jesse James

The Determination is varied or confirmed as follows:

- A. The Aurora Deal – confirmed.
- B. The Bailee Deal – varied, the Appellant is owed \$650.00.
- C. The Osmic Deal – confirmed.
- D. The 1-ton Truck Deal – varied, the Appellant is owed \$150.00.
- E. The Jesse James Trucking Deal – varied, the Appellant is owed \$650.00

Total Commissions due to the Appellant: \$1,450.00

2. Is the employer, Don Folk, liable to pay compensation in lieu of reasonable notice to Turick pursuant to Section 63(3)(c) of the Act?

Under the *Act*, an employee is entitled to be paid compensation for length of service on termination of employment. An employer's liability for compensation is discharged in certain circumstances, for example if there was just cause for the dismissal.

Section 63(3) of the *Act* states as follows:

The liability is deemed to be discharged if the employee

- a) is given written notice of termination as follows:
 - i) one week's notice after 3 consecutive months of employment;
 - ii) 2 week's notice after 12 consecutive months of employment;
 - iii) 3 week's notice after 3 consecutive years of employment, plus one additional week for each additional year of employment to a maximum of 8 weeks' notice.
- b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
- c) terminates the employment, retires from employment or is dismissed for just cause.

(emphasis is ours)

The onus is on the Respondent to show on a balance of probabilities that there was just cause for Turick's dismissal.

Just cause is proved only where:

1. reasonable standards of performance have been set and communicated to the employee;
2. the employee was clearly warned that his or her continued employment was in jeopardy if such standards are not met;
3. a reasonable period of time was given to the employee to meet those standards.

The Appellant, Turick, says that when he was hired he told Pizzuto that he would need time off before one year of employment had expired. Turick says that Pizzuto told him that it would be no problem if Don Folk knew in advance.

Don Folk says that with very short notice, Turick requested the first week of December, 2000, off. The Appellant was told that he could not take that particular week off because they were short staffed and it was busy time of year. The employer furthermore clearly warned Turick that if he went in any event his employment would be terminated.

Turick took holidays that week and Don Folk terminated his employment.

In all the circumstances, Don Folk dismissed Turick for just cause.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination be varied to provide that the Appellant, Cliff Turick, is due commission and bonus monies by the Respondent, Don Folk Chevrolet Oldsmobile Ltd., in the amount of \$1,450.00 plus any accrued interest pursuant to Section 88 of the *Employment Standards Act*. The balance of the Determination is confirmed.

Cindy Lombard
Adjudicator
Employment Standards Tribunal