

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 -

Steve Marshall Ford Ltd.
(“Marshall”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: James Wolfgang

FILE NO.: 1999/445

DATE OF HEARING: September 23, 1999

DATE OF DECISION: November 2, 1999

DECISION

APPEARANCES

Lorrie Bezwa	for Steve Marshall Ford Ltd.
Ann Marie Ebdrup	for Steve Marshall Ford Ltd.
Pat Giraday	counsel for Steve Marshall Ford Ltd.
Grady Mathieson	for himself
Earl Logan	for himself
Gary Mansi	for himself
Scott Leasing	for himself
P.E. Glemnitz	for the Director

OVERVIEW

This is an appeal by Steve Marshall Ford Ltd (Marshall) pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination dated June 23, 1999.

The Determination found Marshall had violated Sections 21, 28, 44, 45, 57, 58, and 63 of the *Act*. The Determination found Marshall had not paid Earl Logan (Logan), Scott Leasing (Leasing), Gary Mansi (Mansi), Pat Cody (Cody) and Greyden Mathieson (Mathieson) proper annual vacation pay, statutory holiday pay and compensation for length of service. It also found Marshall had not paid the same employees the "lot packs" owed and ordered Marshall to pay Logan, Leasing, Mansi, Cody, and Mathieson \$27,085.62.

The Determination indicates if it is appealed the Decision should apply to all sales staff employed by Marshall.

There was a penalty of \$0.00 imposed.

There is a question of how statutory holidays are to be taken/or paid and an issue of the payment of minimum wage to sales persons who have commissions below the minimum wage requirement.

Marshall takes the position they have paid Logan, Leasing, Mansi, Cody and Mathieson all money owed and the Determination should be cancelled.

ISSUES TO BE DECIDED

Does Marshall owe Logan, Leasing, Mansi, Cody and Mathieson any money for minimum wage, annual vacation, statutory holidays, and compensation for length of service? Further, does Marshall owe the above persons commission on “lot packs”?

FACTS

Marshall purchased the automobile dealership from the previous owner early in 1997. All of the sales staff involved except Logan were hired after Marshall purchased the business.

The sales staff were paid on a commission basis, except for Mathieson, who was paid a salary plus commission for fleet sales and a commission if selling other vehicles.

When a vehicle is purchased from the manufacturer there is an amount of money, based on a percentage of the dealer cost, added to the vehicle. This is called a “pack” and is intended to cover overhead and other business costs. A second amount or “pack” is also added to the cost of the vehicle and is a flat dollar figure regardless of the cost of the vehicle. This second pack was applied to both new and used vehicles. That money was kept in a separate account and was used, according to Marshall, for a variety of costs, such as repairs to vehicles damaged on the lot, insurance deductible and after delivery “good will” repairs etc. For example, a vehicle costing the dealer \$10,000.00 would have a \$600.00 “pack” added plus the second “pack” of \$100.00 making the value of the car on the sales lot \$10,700.00. If the vehicle sold for \$12,000.00, the net profit on that sale would be \$1,300.00 and the commission to the sales person would be calculated on that amount.

There is some confusion as to the amount of this second “pack” however, the Determination found it to be \$100.00 per unit. The surplus in that account was paid out, on a discretionary basis, to the sales staff. The sales staff still in the employ of the agency at the time of the disbursement divided the surplus based on the number of vehicles each had sold. Marshall claims this payment is a bonus and is neither wages nor commissions. Income tax was deducted from the payment. Marshall further took the position if the Decision found the sales staff to be entitled to the pack money it should be based on the commission rate of 30% of the \$100.00 and not the total \$100.00 as awarded in the Determination.

The sales staff argue the second pack is a way for Marshall to increase its profit by not paying commission on the “pack”. They also claim it is discriminatory in that it is only paid to the sales staff in the employ of Marshall at the time the bonus is paid. The sales staff also claim Marshall would transfer money from the pack account to the general fund thereby denying them a portion of the fund. The Determination found that the \$100.00 pack was money to which the sales staff were entitled and awarded it to them.

Marshall had paid at least one salesperson minimum wage for a pay period when his sales commission did not equal minimum wage. That money was deducted from his next pay period in which his commissions exceeded minimum wage requirements. Marshall claim an arrangement between the British Columbia Automobile Dealers Association (Dealers) and the Director of Employment Standards allow the Dealers to average the income of sales staff over a period of time. This is to minimize the payment of minimum wage during pay periods in which the commissions earned are less than the minimum wage requirement. Prior to the enactment of the current *Act* the Dealers had a variance, which allowed them to average earnings. That variance was cancelled July 8, 1991, however the Dealers, according to Marshall, continued to apply the same rules and are meeting with the Branch to have a variance cover the current *Act*.

Marshall also claim the draft employment contract for sales staff prepared by the Dealers, and which Marshall believes has the approval of the Branch, provides for sales staff to take another day off in lieu of a statutory holiday, therefore they are not liable for statutory holiday pay as set out in the Determination.

The complainants argue they were never informed of this arrangement and were not given another day off. The agency was closed on statutory holidays.

The Determination states Marshall “did not pay vacation pay correctly, if at all”. The Determination also states the complainants position is “that during their employment they did not receive vacation pay or statutory holiday pay as required by the Employment Standards Act”. I can find no further reference to vacation pay in the Determination except where the delegate adds vacation pay to other calculations, such as statutory holiday pay etc.

Marshall claims the service department checks all used vehicles and necessary repairs are made before the vehicle is put on the lot for sale. This raises the issue of holdbacks or charge backs. The holdbacks or charge backs are for repair work done after the sale of a vehicle and after the commission has been calculated. Marshall indicates where they knew repairs would be made after the sale had been completed they would hold back part of the commission from the sales person until after the repairs were done and the final cost was known. The final net profit would then be determined and the final commission would be paid out. This might involve returning some of the holdback or, if the repair costs were higher, deducting additional money from future commissions.

The Determination states Leasing had charge backs of \$232.07 and Mansi had holdbacks of \$842.08, which were ordered repaid to Leasing and Mansi.

Marshall indicates the Leasing charge backs were in the amount of \$150.21 and \$81.86. The \$150.00 was for service work that was performed on a vehicle Leasing sold. The amount of \$81.86 cannot be found in any of the company records.

Marshall claims they have no record of any hold backs charged to Mansi.

There is an issue relating to deductions without apparent authorization. Marshall deducted \$450.00 from the pay of the sales staff for personal use of demo cars. This is the amount determined to satisfy Revenue Canada that this is a taxable benefit. Marshall deducted the \$450.00 from the paycheque rather than just deducting the amount of tax payable on the taxable benefit. Marshall indicated if the sales person sold one or more cars in the month they would rebate the \$450.00 back to the sales person.

Logan had \$365.00 deducted from his final cheque, which was not identified at the hearing. A copy of the charges was requested and Marshall faxed me a copy of a note stating this charge related to damage to the demo vehicle Logan had been driving. There were a list of separate items which, when repaired, totalled \$365.00.

Marshall also submitted a revised termination pay calculation for Logan. They indicated the \$1,332.80 paid to Logan was after taxes on a total calculation of \$6331.56 as pay in lieu of notice. The new amount they claim owed Logan is \$4,021.44 and should be paid by the previous owner. At the hearing they withdrew that claim and admitted, under Section 97 of the *Act*, Marshall was responsible for the revised amount.

Mathieson was hired as a fleet sales person and paid a salary plus flat commission on fleet sales and regular commission on other sales. The Determination found Mathieson had sold seven vehicles to Timber West and had not been paid his commission of \$25.00 per vehicle at the time of his leaving Marshall. The commissions were not paid at the time of the sale but at the time of the payment and delivery of a vehicle.

Mathieson claims he had sold 26 vehicles to Timber West and produced sales records to support that position. Marshall indicate all those vehicles may not have been delivered or that changes had to be made in the order and another sales person may have taken over that sale and received the commission. There was some indication from Marshall the commission on some fleet sales was \$100.00 per unit but they were unaware of the particular provisions of the Timber West sale.

There was a letter from Cody dated August 05, 1999 stating he did not want to participate in this appeal and that he had not filed a written complaint against Marshall.

ANALYSIS

The complaints have been dealt with in a single Determination, however the circumstances differ on some points for each of the five complainants and I will address the common issues first and then deal with the individual issues separately.

Part of the confusion over the “lot packs” is the amount to be added to the cost of the vehicle. The sales staff claim they do not know what the actual cost of the vehicle is to the dealer. The “sticker price” is not what the dealer may pay the manufacturer with rebates etc. being offered and that information is not provided to the sales staff. Leesing and Logan claim the former Sales Manager told them the second “lot pack” was a “Salesman Fund” and should be considered as a forced savings account and extra Christmas money. They claim he told them it would be \$200.00 per vehicle and later rose to \$220.000 per vehicle.

Marshall claim it was \$100.00 and was not a savings fund or Christmas money but was used to cover incidental costs against the inventory. This is supported by the Determination. If there was a surplus in the fund Marshall would pay a bonus. In fact, Marshall claims in 1997 the fund was overdrawn by \$40,000 but they still paid a bonus.

Marshall has indicated all used vehicles are subject to inspection and repair before being put on the sales lot. It would therefore be unusual for additional repairs to be necessary if the vehicles are properly checked before being put on the lot. There could be a situation where a buyer wants an “add-on” as a condition of purchasing the vehicle and that may be late in the negotiations. That could prompt an additional cost to the sale that was not anticipated and might affect the commission. I was under the impression the “lot pack” money was to cover things like additional repairs after the sale and therefore cannot understand why it should be charged to the sales person except under unusual circumstances.

I believe the second “lot pack” is part of the sales structure and should be considered in calculating the commission owed to each sales person. I agree with Marshall that the amount owed is not the total \$100.00 but only 30% of that amount, which is the commission rate, or \$30.00 per unit for those sales covered by the 30 % commission formula.

There was another group of sales, which were identified as being “Flat Commission” sales. If the net profit on a sale produced a commission below \$100.00 the commission was changed to a “flat commission of \$100.00”. The flat commission sales are not affected by the decision to include the \$100.00 lot pack into the commission formula as they are paid at \$100.00 even if the commission produced a lesser amount. This matter is referred back to the Director to confirm the sales identified as “flat commissions” are correct and the \$30.00 per unit does not apply to those sales.

We have no evidence what the specifics are of the charge back to Leesing for \$150.21. Without an actual invoice it is difficult to deal with this matter. Marshall claims they have no record of the \$81.86 charge back to Leesing as identified in the Determination. Both these items are referred back to the Director to confirm the finding in the Determination.

The Determination indicates a hold back of \$842.08 for Mansi. Marshall can find no record of this hold back therefore this matter is referred back to the Director to confirm the hold back was withheld from Mansi and is properly due him.

Finally there is the question of what commission, if any, should be paid on wholesale sales. Marshall indicated there is no commission payable on wholesale sales. One of the sales staff, Mansi, claims two vehicles identified by Marshall as being wholesale sales were regular retail sales. The matter of the sale of Units 972840 and 11810 is referred back to the Director to determine if these were retail sales and if so, commission is payable, either on the 30% basis or the flat commission basis depending on the net profit on the sales.

Marshall claims the arrangement with the Dealers allows them to have sales staff take time off rather than pay statutory holiday pay. However I was given no indication any sales staff had been advised of this option and no evidence was provided indicating staff had indeed taken such time off. I am in doubt, without an active variance in place, that such a practise is permissible under the *Act*, even if it has the approval of the Branch, which I also doubt. Section 48 (1) of the *Act* states:

An employer may substitute another day off for the statutory holiday if
(b) the employer and a majority of the affected employees at the workplace agree to the substitution.

The *Act* requires a majority of the affected employees must agree to the substitution and we have no evidence this was done. The policy of Marshall was not properly executed and the Determination relating to statutory holiday pay is upheld.

The Determination calculated the rate of pay for statutory holiday at the rate of \$7.00 per hour instead of the average of earnings of each sales person. That matter is referred back to the Director to determine if it is reasonable to determine the proper earnings payable for the statutory holiday in accordance with the Regulations, Part Five, Section 24.

Marshall claims they are guided by the Dealers agreement with the Branch on the payment of minimum wage. That provides for an averaging of earnings over a period of time and if the commissions exceed the amount that would be paid as minimum wage for the period no minimum wage is payable although there may be periods with no earnings. Commissioned salespeople are entitled to earn minimum wage. Where the salesperson's commissions do not total at least the minimum wage for the number of hours worked in a given pay period, the employer is obligated to pay the difference between the commission earned and the minimum wage. Therefore, each employee should be receiving at least minimum wage for all hours worked on each pay cheque.

Section 17 (1) of the *Act* states:

At least semimonthly 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 the **pay period**. (emphasis added)

Each pay period stands on its own and the minimum requirements of the *Act* must be met. I have seen no arrangement approved by the Director that would allow Marshall to average over a period longer than 16 days maximum. The date when commissions become payable depend on the terms of each employment contract. However, employers must still pay employees' wages semi-monthly.

In the absence of any approved variance, the matter of any minimum wage entitlement for the sales staff at Marshall is referred back to the Director for investigation to find if any of the sales persons are entitled to minimum wage for the period.

The deduction of \$450.00 monthly for the demo vehicle has been identified. The practise was to deduct the full \$450.00 from the sales person for the personal use of a vehicle. In the event the sales person sold one or more cars in the month Marshall would return the money to the sales person. It would appear to operate as a negative sales incentive rather than a legitimate calculation of a taxable benefit. This money was deducted without authorization. Marshall claimed it was a requirement of Revenue Canada. The requirement of Revenue Canada, is where a vehicle is supplied to an employee there is a taxable benefit associated with the personal use of that vehicle. The Determination did not address this matter and it is referred back to the Director to determine the extent deductions were made and not returned to the employees.

The matter of a payment of \$10.00 payable to the sales person from the \$120.00 Documentation Service had been raised at the hearing. The sales staff said the former Sales Manager had indicated they would receive \$10.00 from each Documentation Service fee. I have no evidence to support that this was a term of the employment contract of the sales staff and therefore make no ruling.

Marshall submitted a corrected calculation of the amount of pay in lieu of notice payable to Logan. I find that to be correct and the Determination is varied to reflect that Logan is entitled to \$4,021.44 rather than the \$5,378.65 shown in the Determination as payment in lieu of notice.

Logan had \$365.00 deducted from his last pay cheque without explanation. At the hearing Marshall indicated they would provide details as to why the deduction was made. The fax forwarded to me indicated it was for repairs to the demo vehicle Logan had been driving. It was a hand written document signed by the Sales Manager, which outlined the damage to the demo and requesting the payroll department deduct \$365.00 from Logan's final cheque.

Section 21 (2) of the *Act* prevents an employer from deducting money from the wages of an employee where it was a business cost. B.C.E.S.T.D395/98 states “damage to goods, whether caused by negligence or not, are a cost of business to an employer”. This deduction from Logan is disallowed. This matter was not addressed in the Determination but was raised at the hearing from Marshall’s submission.

Mathieson presented evidence of the sale of 26 vehicles to Timber West. Marshall was unable to verify whether all those vehicles had been delivered to Timber West or what additional work may have been required to be performed on them prior to delivery. Marshall indicated a number of changes may be made to an order after it is has been manufactured. This would include changing the factory-installed tires for heavier ones, replacing bumpers etc. They indicate if that were to occur another sales person might receive the commission instead of Mathieson. If that is the case, I believe there should be a sharing of the commission. That matter is referred back to the Director for investigation as to the number of vehicles actually delivered to Timber West, what the proper commission rate should be and determine if other sales staff were involved in the units Mathieson claims to have sold. If other sales staff were involved, what should the proper sharing of commission be? I believe a majority of the commission should be paid to the original sales person, either on a 75/25% or a 60/40% basis depending on the amount of work performed by the second sales person.

Finally the Determination indicated if there was an appeal the decision should be extended to all sales employees since the purchase of the dealership by Marshall. It does not require a decision of the Tribunal to allow the Director to initiate an investigation of any situation where there is a need to do so.

ORDER

In accordance with Section 115 of the *Act* I confirm the Determination dated June 23, 1999 except as amended. The additional items referred to above are also added to the order. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal