

An appeal

- by -

CityChoices Digital Guides Inc.
("CityChoices" or "Employer")

- 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: Paul E. Love

FILE No.: 2002/489

DATE OF DECISION: November 19, 2002

DECISION

OVERVIEW

This is an appeal by an employer, CityChoices Digital Guides Inc. (“CityChoices” or “Employer”), from a Determination dated August 29, 2002 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“*Delegate*”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”). The Employer raises two issues on appeal. The Employer says that the Delegate should have calculated the commission earnings of Mr. Hyer (the “Employee”) on the basis of sales completed, rather than contracts signed. Given the employment contract, this error is conceded by the Delegate, and the Employee made no submission on this point. This is an error which I have corrected in this decision. As a second issue the Employer says that the Delegate erred in failing to credit lease payments made by the Employer, on account of a lap top computer, which the Employee did not return following the conclusion of the employment relationship. It is unnecessary for me to make any determination of the facts related to the lap top computer. It is clear that if the Employer wishes to pursue this issue it must do so in another forum. There is no jurisdiction in the Tribunal to deal with this claim which the Employer seeks to “set-off” against wages. A lease payment for a lap top computer provided to an employee for use in the employer’s business, is a business expense. Employees cannot be made responsible for the employer’s business expenses as provided for in section 21 of the *Act*. I therefore corrected the Determination to provide for the commission overpayment. The corrected amount is \$2,699.25, with interest in accordance with section 88 of the *Act*.

ISSUES:

Did the Delegate err in failing to calculate commissions on the basis of sales made?

Did the Delegate err in failing to credit the Employer with lease payments it made on a lap top computer which the Employee did not return following the conclusion of the employment relationship?

FACTS

I decided this case after considering the submission of the Employer, Employee and the Delegate.

Ron Hyer worked as an assistant vice-president of sales with City Choices Digital Guides Inc. (“City Choices”) from October 1, 1999 to July 6, 2001. His rate of pay was \$48,000 per year, plus commissions. City Choices was in the business of producing a digital guide for tourists.

The Delegate found that the sum of \$3,283.57 was due and owing to Mr. Hyer consisting of total wages of \$3,114.71 and interest from July 6, 2001 to August 29, 2001 in the amount of \$3,283.57. In the Determination, the Delegate found the total wages consisted of commissions earned from June 1, 2001 to July 6, 2001 of \$1,042.90, plus vacation pay of \$62.57, and compensation for length of service in the amount of \$2,812.78, plus vacation pay of \$168.77. The employment agreement between the parties provided that “ Each salesperson will ... make a final attempt to collect any or all outstanding receivable, failing this, a commission adjustment will be made on the account offering 0 % for uncollected monies”. The intent of this clause is that commissions would be calculated on the basis of sales actually made, as opposed to sales contracted.

The Employee did not return to the Employer a company owned lap top, following the conclusion of the employment relationship. The parties have made submissions concerning the facts surrounding this issue, however, it is unnecessary for me to make any findings of fact for the purpose of this appeal.

Employer's Argument:

The Employer argues that the Delegate erred in calculating the amount of commissions on the sales contracted, as opposed to on the basis of actual payment received. The Employer calculated that the amount of commission was \$520.00 not the \$1042.90 found by the Delegate. The Employer further argues that Mr. Hyer did not return a company owned lap top, and therefore the Delegate should have considered the Employer's lease payments on that laptop. The Employer says that when the lease payment and the commission error is considered, Mr. Hyer owes the company \$508.21, which the Employer is willing to waive upon return of the laptop.

Employee's Arguments:

The Employee submits, that he is prepared to accept a \$1,000 reduction in the Determination, if the "Tribunal feels it is fair to deduct \$1,000". The Employee is opposed to paying the business cost of the Employer for the lease payments on the lap top computer. The Employee did not respond to the error which the Employer alleged calculating the commissions on the basis of monies received as opposed to sales contracts.

Delegate's Argument

The Delegate agrees that she erred in calculating the commissions on the basis of sales contracts rather than sales actually made. The Delegate says that the lease payments on the lap top computer are a business cost, and section 21 of the *Act*, prevents the Delegate from considering this cost in the wage calculation.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer, to show that there is an error in the Determination, such that the Determination should be canceled or varied.

Calculation of Commission Wages:

It appears that the Delegate erred in calculating the commissions on the basis of sales contracted, as opposed to sales paid, given the employment contract between the parties. In the written submission of the Delegate the Delegate provided a corrected calculation based on commissions at \$520.00 rather than \$1,042.90. With vacation pay, the total amount of wages owing is \$2,699.25, consisting of \$2,560.44 in wages plus \$138.81 of interest for the period July 5 to August 29, 2002. I accept this corrected calculation, and also find that the Employee is entitled to interest in accordance with s. 88 of the *Act*.

Set-off of Lap-top computer Lease payments:

There is some dispute on the laptop computer. The Employee claims that the company permitted him to retain the property as part of a settlement. This is disputed by the Employer who seeks the setting off of lease payments against wages owing under the Determination. It is unnecessary for me to find any facts related to who has the right to retain this property. If the Employer chooses to seek recovery of its property, and or the value of lease payments, it must do so in another forum, as these matters are not within the jurisdiction of the Tribunal. The lease payment on a lap top computer is a business expense or cost of the Employer. An Employer cannot require an Employee to pay a business cost. These matters are clearly covered by section 21 of the *Act*, and the Delegate cannot deduct these business expenses from the wages claimed by the Employee. This issue is clearly covered by Section 21 of the *Act*, which reads as follows:

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.

I therefore dismiss the argument relating to the Employer's claim to set-off the lease costs for the lap top computer against wages owing under the Determination.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated August 29, 2002 is varied from \$3,283.57 to the corrected amount of \$2,699.25, plus interest in accordance with section 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal