

BC EST #D331/98
Reconsideration of BC EST #D114/98

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of
the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Director of Employment Standards

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Paul E. Love

FILE NO.: 98/375

DATE OF DECISION: August 13, 1998

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DECISION

OVERVIEW

This is an application for reconsideration by the Director of Employment Standards of a decision by an Adjudicator dated February 19, 1998 (BC EST#D331/98). The Adjudicator decided that Kostandin Kocis, a commissioned sales person employed by Fleetwood Motors Ltd. was entitled to payment of a commission on the “sale” of an automobile which was not delivered to the “purchaser”, and was in fact sold to another purchaser by Fleetwood Motors Ltd. The Adjudicator erred in law in determining that “an unlawful refusal to complete the sale by the employer”, triggered an entitlement to commission. In my view, the entitlement to a commission rests on the employment contract between the parties. The relevant contract in this case requires that in order for the employee to earn a commission, the sale must complete with the delivery of the property and payment of the purchase price.

ISSUE TO BE DECIDED

Did the Adjudicator determine correctly that Mr. Kocis was entitled to a commission?

FACTS

The only issue arising in this reconsideration application is whether the Tribunal was correct in reversing the Director’s delegate finding that Kocis was not entitled to a commission. The relevant facts were eloquently stated by the Director’s delegate and the Adjudicator, and I have quoted the relevant reasons from the decision.

Mr. Kocis was employed as a sales person with Fleetwood Motors Ltd. in Surrey, British Columbia. He was paid on a commission basis.

The Director’s delegate found the following:

January 5, 1997 Sale

Mr. Kocis sold a vehicle to a customer who was located in Prince George. The sale was approved by the sales manager. The customer put down a down payment to secure the vehicle. Mr. Kocis is claiming he is owed commission on the sales he made to the Prince George customer.

The employer takes the position that the vehicle wasn’t sold by Mr. Kocis but was presold by the owner of the company before it was sold by Mr.

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Kocis. Therefore no commission is owed to Mr. Kocis. Furthermore, Mr. Kocis earns commission at the rate of 35% as a percent of commissionable profit on sales when the goods are delivered and paid for in full by the customer.

Conclusion:

When is a sale not a sale? This is not the question. The crux of the matter is when does Mr. Kocis earn a commission. He has provided no documents to establish that the position of the employer is not correct. That is to say, the commission is earned when the goods are delivered to the customer and paid for in full by the customer. It matters not whether the owner of the company refused to sell the car to the Prince George customer or in fact he had pre sold the vehicle to another customer. The bottom line is Mr. Kocis could not earn a commission on goods that were not delivered and paid by the customer.

For the above reasons the claim of Mr. Kocis for wages, on a vehicle sold by another salesperson, manager or owner is denied.

The Adjudicator found that Mr. Kocis had made out the claim for commission and in particular stated:

The evidence before me, both viva voce and documentary, is that Kocis was instrumental in the negotiation of a binding contract for sale (including the payment of a deposit) with a customer from the Prince George area for a used Mazda 626 vehicle. I might add that Darren Chura was the very individual who finalized the sale and accepted, in writing, the customer's offer on behalf of Fleetwood. The sales contract, Ex. I refer to the appellant as the salesperson of record. Later, Mr. Chura's father, the owner of the dealership, purported to "refuse to approve" the contract.

For reasons of its own (likely because the sale would not have generated a sufficiently large profit) and much to the obvious, and documented, distress of the would be purchaser, the employer decided not to honour the sales agreement. In my view, the employer's unilateral action in refusing to proceed with the sales agreement amounted to a breach of contract with the purchaser and such action cannot be a legally sufficient reason for denying Kocis his earned commission on the sale. If it could be said that the sales agreement was "frustrated", it was frustrated by the independent action of the employer and thus, Kocis was nonetheless entitled to his commission.

ANALYSIS

On a reconsideration application my jurisdiction is limited to a review of the decision and evidence to determine if there was a demonstrable breach of the rules of natural justice,

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compelling new evidence that was not available at the time of the original hearing or a fundamental error of law: Zoltan Kiss, BC EST #D122/96.

This reconsideration proceeded upon written submissions of the Director alone. There was no submission filed by any of the other parties. The Director argued:

1. The entitlement to commissions depends on the contract between the parties, and in this industry a sale is not considered completed until the customer takes delivery of the vehicle. This amounts to a serious misapprehension of the facts and error of law.
2. This decision is inconsistent with the approach of the Tribunal in Tandem Computers Ltd., BC EST #D195/96 and Zaprawa, BC EST #D083/97 and Brule, BC EST #D361/97.

When is a commission earned?

The *Act* does not define when a commission is earned. The relationship between employee and employer is one of contract, and the effect of the *Act* is to prescribe minimum conditions for contracts of employment. The interpretation of an employment contract is a question of law. The entitlement of an employee to a commission depends on the facts and the interpretation of the employment contract.

The Adjudicator determined as a matter of law that a commissioned salesperson could not be deprived of a commission by virtue of a failure of the employer to complete a sale. There is, however, no support in the *Act*, in the employment contract, or in the evidence for this proposition.

I have reviewed the commission agreement signed by the parties which was filed as Exhibit "3". This document refers to "Total gross earnings as a percent of commissionable profit on sales - 35%." The agreement further reads that "It is recognized that the commission as a percentage of commissionable gross profit on sales may vary from time to time in response to marketing program and sales efforts".

The parties have not expressed what would happen if a salesperson devoted efforts to arranging a sale, and whether a commission could be earned in the absence of a completed sale. It is quite clear, however, that a profit would not arise upon an arrangement of a sale. A profit would arise only on the delivery of the property and payment of the purchase price.

It appears, from a reading of the Decision that the Adjudicator believed that it was unfair that a commissioned salesperson could be deprived of a commission because the employer chose to breach a contract with a customer. The employer employs salesperson to arrange contracts. It is, however, a matter for the employer to decide whether the contract will be performed. Presumably an employer who fails to approve and perform contracts is subject

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to the sanction of the market place or a lawsuit. This is a case, however, where the customer did not sue the employer for breach of a contract for delivery of goods.

It is my view that the Adjudicator erred in this case because he did not give affect to the agreement of the parties and the uncontroverted evidence of the employer that a commission was not earned until a vehicle was delivered. There was evidence before the Adjudicator, by way of letter to Mr. White, Industrial Relations Officer from Mr. Norman of Fleetwood indicating that “it is only after a unit is delivered and paid for in full is a commission authorized to any salesperson”. This evidence was not contradicted in any written material which was filed with the Tribunal. The Adjudicator has not found as a matter of fact that the industry practice with regards to payment of commissions was other than as set out in Mr. Norman’s letter.

The employer’s approach is supported by the law relating to the sale of goods and in particular by s. 32 of the *Sale of Goods Act, R.S.B.C. 1996 c. 40*. This legislation provides that:

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for the goods.

The entitlement to a commission arises upon the completion of the sale, not on the arrangement of a sale. The sale is completed when the vehicle is delivered and the price paid. The gross profit is then earned by Fleetwood. The receipt of the gross profit then triggers the obligation to pay commission. If “arrangement” was sufficient, then as a matter of logic, the employer would be obliged to pay the commission, if the buyer defaulted on her contractual obligations and failed to complete a sale.

In my view it is not relevant as to the reasons why the sale did not complete. If an owner of a car lot was in the habit of interfering with sales contracts by failing to deliver the vehicle, such a situation might amount to a “constructive dismissal”, thus entitling the “constructively dismissed” employee to compensation for length of service or damages at common-law. In this particular case, however, the Adjudicator found that the employee resigned from his position. That finding has not been appealed.

The Adjudicator’s decision does appear to be inconsistent with the approach in Zaparawa, Brule and Tandem Computers. In each of these cases the Tribunal considered the applicable commission agreement between the parties and determined whether the commission had been earned in accordance with the commission agreement.

In my view the Adjudicator erred in law in determining that “an unlawful refusal to complete the sale”, triggered an entitlement to commission. In my view, the entitlement to a commission depends upon the completion of a sale by delivery of the property and payment of the purchase price.

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ORDER

Pursuant to section 116 of the *Act*, I order that the Decision in this matter be cancelled.

Paul E. Love
Adjudicator
Employment Standards Tribunal