Manitoba Labour Board
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Case No. 41/13/ESC
File No. 113515

IN THE MATTER OF: THE EMPLOYMENT STANDARDS CODE

BETWEEN:

PARKSIDE FORD LINCOLN LTD.,

Employer,

- and -

W.O.,

Employee.

BEFORE: **W.D. Hamilton, Vice-Chairperson**

C. Lorenc, Board Member

S. Oakley, Board Member

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

SUBSTANTIVE ORDER

WHEREAS:

1. On January 30, 2013, pursuant to Section 96(1) of *The Employment Standards Code* (the "*Code*"), the Director of the Employment Standards Division ordered that the amount of Eight Thousand Thirty-Two Dollars and Five Cents ($8,032.05) being wages owing by the Employer to the Employee be paid to the Director of the Employment Standards Division by the Employer and further required the payment of the administrative fee in the amount of Eight Hundred Three Dollars and Twenty-One Cents ($803.21) for a total owing of Eight Thousand Eight Hundred Thirty-Five Dollars and Twenty-Six Cents ($8,835.26) (the "Order").

2. The Employer having disputed the payment of the above-mentioned amount, the Director of the Division, pursuant to Section 110 of the *Code*, referred the matter to the Manitoba Labour Board (the "Board").

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3. The Statement of Adjustment (the "Statement") (Ex.1), which accompanied the Order, detailed the basis for the total amount of the Order, as follows:

   a) an improper deduction from the Employee's wages of One Thousand Nine Hundred Fifty-Three Dollars and Fifty Cents ($1,953.50) comprised of a deduction of Nine Hundred Fifty-Three Dollars and Fifty Cents ($953.50) from vacation wages owing to the Employee and a payment by the Employee via debit of One Thousand Dollars ($1,000.00); and

   b) vacation wages owed to the Employee in the amount of Six Thousand Seventy-Eight Dollars and Fifty-Five Cents ($6,078.55) for the period November 7, 2010 to September 7, 2012 based on premium earnings, commissions and incentive payments paid to the Employee during this period. A spreadsheet attached to the Statement showed that the Employee received the total amount of One Hundred Fifty-One Thousand Nine Hundred Sixty-Three Dollars and Seventy-Four Cents ($151,963.74) on account of premium earnings, commissions and incentive payments and that vacation pay at 4% on this amount was Six Thousand Seventy-Eight Dollars and Fifty-Five Cents ($6,078.55).

4. On May 8, 2013, the Board conducted a hearing at which time both parties appeared and presented evidence and argument.

5. The basis of the Employer's appeal is contained in a letter dated January 31, 2013 (Ex.2), as follows:

   "1. a. Unauthorized deductions – (W.O.) paid on his personal debit card (no payroll deduction was made) and the payroll deduction was authorized by his personal e-mail.

   b. It has been acknowledged by (W.O.) that without authorization he provided vehicles to his family and friends on a consecutive basis from April 13, 2012 until May 30, 2012. This included 7 different vehicles for one to two week durations. When damages were noticed on the vehicles, (W.O.) advised he had provided the vehicles without authorization and would assume responsibility for all damages, including parking and speeding tickets. The friends to whom (W.O.) lent the vehicles to never attended Parkside Ford to pick up any vehicle; (W.O.) would take the vehicle from Parkside Ford and deliver them personally.

   c. As a payroll deduction per the Employment Standard code, an employee needs to receive a benefit for the payroll deduction, Parkside

Ford's position is; (W.O.) made his own decision to pass along the benefit to family and friends.

2. Vacation pay – (W.O.) was paid vacation based on his salary (wage). The premium earning's (incentives) are a bonus. We based our decision on the Employment Standards Code; Part 2 Division 5 #40 - certain payments (bonus) do not affect vacation entitlement."

6. At the hearing, the Employer confirmed that there is no dispute over the fact that the Employee earned One Hundred Fifty-One Thousand Nine Hundred Sixty-Three Dollars and Seventy-Four Cents ($151,963.74) as commissions or incentive earnings, as disclosed on the Statement. The Employer only contests its liability to pay vacation pay on this amount, based on its interpretation of Section 40 of the *Code*.

7. The Board will address the Employer's appeal on vacation pay and deductions from wages separately.

Vacation Pay

8. The material facts relating to the vacation pay issue may be summarized as follows:

a) At all material times, the Employee was a Sales Manager with the Employer.

b) During his employment with the Employer, the Employee was paid in accordance with a compensation plan which reflected the following principles:

i) Payment of a base monthly salary, payable bi-weekly. During 2010 and 2011 the base salary was Four Thousand Dollars ($4,000.00) per month and in 2012 the base salary was Five Thousand Dollars ($5,000.00) per month.

ii) In addition to the base salary, the Employee received monthly incentives and year end incentives calculated in accordance with pre-determined and known formulas based either on gross monthly or yearly sales or, for some year end incentives, based on the total of new or used units sold. The percentages payable on these incentives varied (i.e. increased) as gross sales increased. By way of example only, the monthly incentive in the 2011 Pay Plan stated as follows:

"New, Used + F + I Gross (excludes Fleet and Commercial)

0 - $200,000	pays 2.5% of monthly gross
$200,000 – 250,000	pays 3.5% of monthly gross-retro
$250,000 plus	pays 4.5% of monthly gross-retro"

c) At the time of his hire in 2010, the Employee signed for a copy of the Employer's Handbook which contained the following statement:

> "Statutory holiday pay, demo allowance and bonuses/spiffs/ incentives are not part of the calculation of holiday pay"
>
> (Emphasis added)

Further, the 2012 Pay Plan stated, in part, as follows:

> "Vacation pay is 4% for first five years and 6% thereafter. Vacation pay is based solely on salary, incentives are not included …."

A representative of the Employer and the Employee signed the 2012 Pay Plan.

d) As noted in Para 3, *supra*, the Employer confirmed that the total amount of One Hundred Fifty-One Thousand Nine Hundred Sixty-Three Dollars and Seventy-Four Cents ($151,963.74) accurately reflected the amount paid to the Employee on account of monthly and yearly incentives/premiums. However, the Employer only paid vacation pay to the Employee on his base monthly salary. It characterized the premium earnings (incentives) as a bonus and asserted that vacation pay was not payable on a "bonus". In taking this position the Employer relied on Section 40 of the *Code* which states as follows:

> "The payment of a bonus or other pecuniary benefit by an employer to an employee does not affect the employee's entitlement to an annual vacation or vacation allowance."

9. Having regard to the relevant provisions of the *Code*, and after considering the positions of the parties in the context for the material facts recited above, the Board has DETERMINED that the appeal of the Employer on the issue of vacation pay is not sustainable and that the provision in the Order directing that Six Thousand Seventy-Eight Dollars and Fifty-Five Cents ($6,078.55) is owed to the Employee for unpaid vacation pay is CONFIRMED. The material reasons for this determination may be summarized as follows:

a) Vacation pay at the appropriate percentage (here, 4%) must be paid on the "wages" earned by an employee during the relevant period. As the Employee's employment ended on September 7, 2012 (evidence of Employee), he was entitled to file a complaint seeking an unpaid vacation allowance that became due and payable within the last 22 months of his employment [Section 96(2)(b) of the *Code*]. The Order issued by Employment Standards related to this period.

b) "Wage" is defined in Section 1 of the *Code* to mean:

> "…except where otherwise provided in this Code or prescribed by regulation, compensation for work performed that is paid or payable to an employee by his or her employer, and includes
>
> (a) Salary, commission, or compensation in any other form whether measured by time, piece or otherwise, and
>
> (b) A payment to which an employee is entitled under this Code, including a vacation allowance and any other benefit to which an employee is entitled under this Code"
>
> (Emphasis added)

c) The payments received by the Employee under the Employer's compensation scheme clearly fell within the foregoing definition of "wage". The "incentive" payments made to the Employee were, in reality, a "commission". These payments were based on a fixed formula and the monthly and/or yearly income of the Employee was tied to his job performance based on the gross value of sales made or, in some cases, the number of vehicles sold. This wage plan cannot be characterized as a "bonus" which is payable at the Employer's discretion on an *ex gratia* basis.

d) While vacation pay is not payable on overtime wages, a wage in lieu of notice payable under Section 61(1)(b) of the *Code* or vacation allowance itself [see Sections 39(1) and 44(1) of the *Code*] none of these specific exclusions apply in this case, as the incentive payments received by the Employee formed part of his regular compensation for work performed.

e) The Employer's reliance on Section 40 of the *Code* cannot be accepted as a defence to the Employee's claim for vacation pay. This Section is not a "limiting" provision. Rather, this Section is "confirmatory" in nature in that its purpose is to ensure that an employer cannot reduce or offset an employee's entitlement to a vacation or vacation pay (on "wages") by reason of any bonus or other pecuniary benefit provided by an employer. Section 40 reinforces an employee's entitlement to vacation pay.

f) The fact the Employee signed the Handbook and/or the Pay Plan which contained a provision that vacation pay was to only be based on the base salary, and not "incentives" or "bonuses" cannot be relied upon and it does not affect the Employee's entitlement to vacation pay. Any suggestion to the contrary is answered by Sections 3(3) and 4(1) of the *Code*, which state as follows:

> "3(3) This Code prevails over any enactment, agreement, right at common law or custom that
>
> (a) provides to an employee wages that are less than those provided under this Code; or
>
> (b) imposes on an employer an obligation or duty that is less than an obligation or duty imposed under this Code.
>
> 4(1) An agreement to work for less than the applicable minimum wage, or under any term or condition that is contrary to this Code or less beneficial to the employee than what is required by this Code, is not a defence in an proceeding or prosecution under this Code, even if the terms and conditions of the agreement, as a whole, are better for the employee than what is required by this Code."

Deductions from Wages

10. The events giving rise to this issue occurred during the months of April and May, 2012 (some three to four months prior to the cessation of the Employee's employment). The evidence revealed that, on certain occasions, the Employee allowed potential customers (one being his brother) to sign out vehicles to test drive them on the expectation that a sale may be consummated. While the vehicles were in the possession of these individuals (for varying periods of time), the vehicles were either damaged or radar/parking tickets were issued. Three radar tickets totaling Six Hundred Eighty-Five Dollars and Fifty Cents ($685.50) were issued; one parking ticket for Seventy Dollars ($70.00) was issued and two vehicles were damaged requiring repairs to be made which were invoiced for a total of One Thousand One Hundred Ninety-Nine Dollars and Thirty Cents ($1,199.30) (See Ex. 4). A person taking possession of a vehicle signs a form stating that he/she is responsible for any damages/accidents ($500.00 deductible), speeding tickets, parking violations and camera violations during the time he/she is using the vehicle. With the exception of his brother, a sign out sheet was signed by all persons taking possession of the foregoing vehicles and they were authorized by the Employee, as required by standard policy. In this regard, the Over-Night Dealer Plate Control forms were completed in all cases (See Ex. 6).

11. The Employee met with representatives of the Employer on May 31, 2012 at which time irregularities in the sign out policy were discussed and the Employee was, in effect, advised that he was responsible for paying the foregoing amounts or they would be paid by means of (a) payroll deduction(s). As events unfolded, Nine Hundred Fifty-Three Dollars and Fifty Cents ($953.50) was paid by deducting this sum from the one week vacation pay still owing to the Employee for 2012. The Employee authorized the deduction of this sum from his vacation pay [Ex. 3(a)]. The Board accepts the Employee's evidence that he was told by the General Manager of the Employer that he was responsible for paying the total of One Thousand Nine Hundred Fifty-Three Dollars

and Fifty Cents ($1,953.50). Further, the evidence confirms that on or about June 12, 2012, the remaining One Thousand Dollars ($1,000.00) was paid via debit card by the Employee. However, this payment was made in this manner only after the Employee requested that his commission cheque (then owing) be first deposited to his bank account after which he would return and pay the One Thousand Dollars ($1,000.00) by debit. Otherwise, the Board is satisfied that the Employer would have deducted this sum from wages owing to the Employee at that time.

12. As to other evidentiary matters, the Board is satisfied:

    a) that, as Sales Manger, and in accordance with procedures then in place, he was authorized to release vehicles to potential customers shopping for a vehicle;

    b) that the Employee was not personally responsible for any of the damage done to vehicles nor were the photo radars and/or parking tickets issued to him personally;

    c) that, aside from his brother, none of the other persons involved were family and friends of the Employee; and

    d) it is not an uncommon occurrence in this industry that vehicles owned by a car dealership will be damaged while in the possession of a potential customer on a test run (evidence of Employer representative).

13. The "deduction" issue is to be resolved under the rules prescribed by Section 19 of the *Employment Standards Regulation* (the "*Regulation*"). The relevant provisions for the purposes of this appeal are as follows:

> "19(1) An employer must not deduct any amount from the wages payable to an employee except as required by federal or provincial law or as permitted by a court order or subsection (2).
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> 19(2) The following rules apply in determining what may be deducted from a payment of wages:
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> > 1. An employer may, with the employee's consent, deduct an amount for something provided as a direct benefit to the employee which the employee was not required to obtain or was not required to obtain from the employer.
> >
> > 5. An employer must not deduct any amount to cover any cost or loss arising from faulty work of the employee or damage caused by the employee.

> 8. An employer may deduct the minimum amount payable by the employer for an offence that
>
> > (a) was committed by the employee; and
> >
> > (b) is being prosecuted against the employer under subsection 13(1.1) of The Summary Convictions Act;
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> if the employee has authorized the employer, in writing, to deduct that amount"

Sections 19(3) and (4) of the *Regulation* go on to state, in part, as follows:

> "19(3) An employer must not require an employee …. to pay any other amount that the employer is prohibited by subsection (2) from deducting from a payment of wages.
>
> 19(4) If an employer requires and employee to pay for something contrary to subsection (3), and the employee has paid for it, the amount paid is deemed to be a wage owing by the employer to the employee."

14. Having regard to the relevant provisions of the *Regulation* (*supra*), and after considering the evidence and arguments adduced by the parties, the Board has DETERMINED the Employer's position that the Employee was responsible for paying these amounts and that deductions could be made from the Employee's wages to ensure payment thereof is not sustainable. Therefore, the provision in the Order directing that One Thousand Nine Hundred Fifty-Three Dollars and Fifty Cents ($1,953.50) is owed to the Employee for improper deductions is CONFIRMED. The material reasons for this determination may be summarized as follows:

    a) The Board does not accept that Rule 1 of Section 19(2) of the *Regulation* is applicable in the circumstances prevailing. The requirement of the Employer that the Employee pay One Thousand Nine Hundred Fifty-Three Dollars and Fifty Cents ($1,953.50) cannot be characterized as the Employer having provided a "direct benefit" to the Employee within the meaning of Rule 1. Rather, it was a case of the Employer imposing a liability on the Employee.

    b) Notwithstanding what transpired on May 12, 2012 [i.e. the Employee paying One Thousand Dollars ($1,000.00) via debit], this fact does not affect the true characterization of the events, namely, that it constituted a deduction from wages otherwise payable to the Employee, contrary to Sections 19(1); 19(2)5; 19(3) and 19(4) of the *Regulation*. The Board is satisfied that the Employee did not voluntarily

consent to a deduction which would be of a direct benefit to himself and further, that the Employer, in effect, required the Employee to pay these amounts contrary to Section 19(2)5 meaning that the amounts retained by or paid to the Employer are " …deemed to be a wage owing by the employer to the employee" [see Section 19(4) of the *Regulation*].

c) Further, Rule 19(2)8 does not apply because, in no case, was any "offence" committed by the Employee. Any offences were committed by persons who had been given possession of the vehicles.

d) To the extent that the Employee (purportedly) agreed or consented to the deduction and/or "payment" (i.e. Ex. 3), the Board is satisfied that Sections (3) and 4(1) of the Code apply [see Para 9(f), *supra* where these sections are quoted].

e) In coming to these determinations, the Board had regard to its previous decision in *Kildonan Ventures Ltd. t/a Kildonan Auto & Truck Sales and J.S.* [Case No. 200/09/ESC, October 29, 2009] ("*Kildonan*"). In particular, the remarks of the Board at Para 5(c) of *Kildonan* are applicable to this appeal, namely:

> "c) In arriving at its conclusion, the Board also applied the general law applicable in circumstances of this nature, namely, that an employer cannot unilaterally determine the liability of an employee or the quantum of damages and then seek to deduct any such amount from wages owing to the Employee. In this regard, the decision of *Kodiak Parking Services Limited* and *Kowalson,* (a decision of the County Court of Winnipeg, dated April 22, 1981), is instructive, particularly the comments of the Court at pages 5 to 7 thereof. The principles applied by the Board in *St. John's Aqua King Swim Club Inc. trading as Winnipeg Wave Swim Club* and *Robert Novak* (Case No. 488/05/ESC) dated May 18, 2006, at paragraph 4(d) and in *Alias Autobody Limited* and *Serhiy Osipov* (Case No. 110/06/ESC) dated July 11, 2006 at Para 5(a) are to similar effect;"

15. While the Employer is not precluded from seeking and may be able to seek recovery or restitution in other forums (upon which the Board expresses no opinion), the Board, being a statutory tribunal whose jurisdiction is limited by the provisions of the *Code* and the *Regulation* [particularly Section 19(2)], the Board, for all of the reasons hereinbefore recited, dismisses the appeal of the Employer and confirms the Order that the Employee is entitled to be paid the sum of Eight Thousand Thirty-Two Dollars and Five Cents ($8,032.05), as recorded in the Statement (Ex. 1).

T H E R E F O R E

The Manitoba Labour Board **HEREBY ORDERS PARKSIDE FORD LINCOLN LTD.** to pay to the Director of the Employment Standards Division forthwith**;**

WAGES:

The amount of Six Thousand Seventy-Eight Dollars and Fifty-Five Cents ($6,078.55) less statutory deductions, being vacation wages owing to the Employee, W.O.

DEDUCTIONS FROM WAGES:

The amount of One Thousand Nine Hundred Fifty-Three Dollars and Fifty Cents ($1,953.50) being payment for deductions from wages of W.O.

ADMINISTRATIVE FEE:

An Administrative Fee in the amount of Eight Hundred Three Dollars and Twenty-One Cents ($803.21) pursuant to Section 96(1) of *The Employment Standards Code*.

TOTAL:

The total amount being Eight Thousand Eight Hundred Thirty-Five Dollars and Twenty-Six Cents ($8,835.26).

DATED at **WINNIPEG**, Manitoba, this 11th day of October, 2013, and signed on behalf of the Manitoba Labour Board by:

"Original signed by"

W. D. Hamilton, Vice-Chairperson

"Original signed by"

C. Lorenc, Board Member

"Original signed by"

S. Oakley, Board Member

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