

The Small Claims Court of Nova Scotia
Cite as: Gillis v. Innova Medical Ophthalmics Inc., 2013 NSSM 27

Between:

Kevin Gillis

Claimant

And

Innova Medical Ophthalmics Inc.

Editorial Notice

Addresses have been removed from this electronic version of the judgment.

Decision

Adjudicator: David TR Parker

Heard: April 8, 2013 and April 9, 2013

Decision: June 27, 2013

1. This matter came before the Small Claims Court on January 10, 2013 at which time the claimant appeared but the defendant Innova Medical did not appear. An oral decision was filed with the Small Claims Court on January 17, 2013 awarding the claimant \$22,294.94 inclusive of costs.
2. An application to set aside the Order was made by the defendant Counsel and a hearing was held on the application and this court set aside the Order and set a new hearing date. The hearing took place on April 8, 2013 with final submissions provided on April 9, 2013.
3. The original claim was for \$13,759.00 representing unpaid commissions of \$3976.00, 11 unused vacation days for the year 2011 resulting in a claim of \$3470.00 and four weeks severance pay of \$6313.00.
4. The claim morphed into further claims for unpaid commissions which I shall deal with in a moment.
5. The claimant commenced his employment with the defendant company in late November 2010 and his last day of employment with the company was October 23, 2012. The company provided him with a letter of termination of employment along with compensation package of \$21,074.74 less monies owed to the company by the claimant and less statutory deductions resulting in a total payout of \$12,260.97. This letter of termination was provided on October 31, 2012. The claimant in order to receive the monies was to return certain equipment to the company.

6. The termination package as it were, included commissions due between September 1, 2012 to October 24, 2012, in the amount of \$6087.70. At the time the claimant refused to accept the payout of \$12,260.97 as stated above because he wanted confirmation and verification on the commissions due to him. In other words support for the amount of \$6087.78.

7. As a result of the claimant not accepting the termination package the defendant company provided the claimant the same termination package except for four weeks' severance of \$6313.23. The four weeks' severance had previously been offered to the claimant in the defendant's letter of October 26, 2012. All the rest of the defendant's offer remained the same. Therefore they provided the claimant with a check in a letter dated Wednesday, October 31, 2012 in the amount of \$9104.37 made up of the following:

- six days of gross pay for the current pay period, \$1893.97;
- commissions due September 1 to October 24 \$6087.78;
- two weeks pay in lieu of notice, \$3156.62;
- vacation due in the amount of \$887.46; expenses due,
- \$2735.69

For a total of \$14,761.51

- less personal shipment costs of \$562.18;
- less medical and dental benefits of \$20.50;
- less statutory deductions of \$5074.47;

For a total net compensation package all \$9104.37.

8. The compensation package did not include a four weeks' severance amount of \$6313.23 as offered in the defendant company's previous letter to the claimant on October 26, 2012.
9. The employment contract between the parties deals with termination of an employee in this case the claimant, wherein it is stated:
10. "In the event of termination for other than cause the employee shall be entitled to be paid commissions on all orders on hand as of the date of termination for which the equipment and or instruments *have actually been delivered* [emphasis added] to the customer *but not for orders for which the instruments and or equipment has not been delivered to the customer as of the termination date.*" [Emphasis added]
11. Married to the employment contract is a compensation plan which contains a number of causes some of which I refer to as follows:
12. "Article 4 Payment of Commissions: commissions will be considered earned once Innova [the defendant] has been paid in full for the sale. Earn commissions are payable at the end of the month following the time the customer has paid their invoice in full. The salesperson will be responsible for invoices in his/her territory and make his/her best efforts to affect payment in a timely manner.
13. Article 9 Territories: "in general there will be no grandfathering of accounts. However, in limited circumstances, sales management may at their discretion, may allow sales representatives to close named

opportunities after territory account change. These deals it must be named by the manager and communicated in writing to the sales compensation department at the time of change. Therefore, if these deals are closed, within an agreed period of time, full revenue credit will be provided to the grandfathering representative. Under no circumstances, will there be double comping on these deals. The company reserves the right to modify territories at any time during the plan.

14. Article 10 Dispute Resolution: all internal disputes relation to the plan, its terms or the implementation, including but not limited to any disputes between plan participants as to the allocation of any commission or bonus payments will be referred to the manager of the relevant territory who may in turn refer disputes to the president. Ultimately, owner and president of Innova will make the final decision on any dispute, such decision being binding to all parties.
15. Article 11 Administration: the company reserves the right to modify the calculation or the allocation of the commission and or credit where, in its opinion such modification results in a more proper matching of results and compensation. The manager and the president of Innova [the defendant] shall have **final** responsibility, authority and discretion in all matters of administration of the plan.
16. Final Compensation: the final amount of any compensation due to a terminated plan participant, regardless of whether such plan participant was terminated voluntarily or involuntarily is only that portion earned on actual deals completed [delivered] within the terms of the plan, up through

the last day of employment. The amount of any compensation due to a plan participant who has not fully participated in a deal, is only that portion earned on actual deals completed within the terms of the plan. Final determination of the amount of compensation is at the sole discretion of his direct manager and president of Innova [the defendant].”

17. The commissions that the claimant is seeking were for sales to:

Eye World \$1036.00
Bayview Optical \$968.40
Dr. Cormier \$1495.40
Dr. Stan George \$180.00
Western health \$674.00
Memorial Hospital Labrador \$4000.00
DND Statacona \$1196.00
Dr. Richard \$1200.00
Q EH Halifax \$2800.00

18. Under the Compensation Plan disputes with respect to commissions will be dealt with by the company and the company’s owner and president will make the final decision on any dispute and further the final amount of commission due on termination of the claimant in this case is again at the sole discretion of the company. However the defendant is required to pay the employee for equipment actually delivered. More particularly the employment contract allows for an employee to be entitled to commissions on orders made up to the date of termination for which the equipment has actually been delivered to the customer but not for orders which the equipment has not been delivered to the customer. The claimant is seeking compensation for some orders that he made and that he was

responsible for even though that equipment had not yet been delivered at the date of his termination. The claimant is also seeking commissions for orders that he feels were in his territory or for which he felt were clients of his. The last two categories would be determinations ultimately resolved by the company. The only orders that were squarely the claimant's orders and which were delivered prior to the termination of the claimant would be the Eye World order of \$1036.00 commission and possibly the Dr. Stan George order of \$180.00 commission. The other orders that the claimant is seeking commission on were either delivered after termination or were commissions in which other people were involved from other territories or previous to the Claimant's involvement and would be a discretionary decision of the company or were for orders that were outside the territorial jurisdiction of the claimant. I would allow the claimant these two amounts. I would not allow the severance claim of \$6313.00 as there is no contractual or legislative right to same. With respect to the vacation pay, for those days that the claimant is claiming but did not take the company did abide by the wording of the contract in paying vacation pay. If the claimant did not take, vacation when he should have the final determiner of that would be the contract. The claimant is also seeking costs for one day work of \$315.00, Court costs of \$189.00 and \$75.00, parking of \$40.00, copies of documents in the amount of \$123.00 and trial preparation of \$2130.00. Based on the information I have before me I am prepared to allow court costs

It Is Therefore Ordered That the defendant pay the claimant the following sums

\$1036.00 commission Eye World

\$ 180.00 commission Dr. Stan George

\$ 264.00 court costs

\$1480.00

Dated at Halifax this 27th day of June 2013