Then Kwen Choy Kevin v VibroPower Pte Ltd
[2008] SGHC 94

Case Number : Suit 148/2007

Decision Date : 24 June 2008

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Ponniah James Leslie and Leong Sue Lynn (Wong & Lim) for the plaintiff; Lok Vi Ming SC, Derek Kang Yu Hsien, Pan Xingzheng Edric and Yong Shuk Lin Vanessa (Rodyk & Davidson LLP) for the defendant

Parties : Then Kwen Choy Kevin — VibroPower Pte Ltd

Contract

24 June 2008 Judgment reserved.

Choo Han Teck J:

1 The plaintiff was formerly employed as the assistant general manager of marketing by the defendant company which was in the business of making and selling diesel electricity generators. The plaintiff was employed under an employment contract dated 5 June 1999 ("the contract") and his employment was terminated on 15 January 2007. The plaintiff's claim in this action was for commission for various sales, amounting to $563,631.00 as well as interests on the commission. The bulk of the $563,631.00 commission claimed was for sales between 2004 to 2006 amounting to $28,036,649.00 for which the plaintiff's claim for commission was $510,999.00. The remainder was for $52,632.00, being the balance commission unpaid in respect of sales serviced by the plaintiff in 2003, after payment of $34,247.00. The plaintiff's initial salary was $8,300.00 and he received a further sum of $750.00 for transport. By 2001, his salary was increased to $8,750.00.

2 The relevant clause in the contract regarding the payment of commission was cl 5 which provided as follows:

> Performance bonus:
>
> You are entitled to a commission scheme based on performance as outlined below:
>
> 1st Year
>
> Commission is calculated on the basis of average nett margin multiply by a factor of 0.25 for sales above S$4,000,000.00 in the 1st year. No commission will be paid for sales up to S$4,000,000.00.
>
> E.g. On S$7,000,000.00 sales achieved in the 1st year and at average nett margin of 5%, commission payable to you is equal to (7,000,000 – 4,000,000) * 0.05 * 0.25 or S$37,500-00
>
> 2nd year onward
>
> Commission is calculated on the basis of average nett margin multiply by a factor of 0.25 for sales above S$5,000,000.00 in a one year period. No commission will be paid for sales up to

S$5,000,000.00.

E.g. On S$9,000,000.00 sales achieved in the 2nd year and at average nett margin of 5%, commission payable to you is equal to (9,000,000 – 5,000,000) * 0.05 * 0.25 or S$50,000-00.

Note: Nett margin is gross margin less 2%. Gross margin is selling price less cost of material, sub-contract cost, freight and insurance, where applicable.

3 The crux of the dispute was whether the plaintiff's sales for the relevant period exceeded $5,000,000.00 because if they were not, the plaintiff would not, under cl 5, be entitled to any commission. The plaintiff's case was based on the undisputed fact that some sales were made during the period in question in India. The question was whether the sales in India were his sales. The defendant's evidence showed that the sales in India were made by a separate team of salesmen. The plaintiff, however, claimed that those salesmen consulted him for advice and he was thus entitled to claim the commission. He claimed that he had the supervision and responsibility for the collection of payment from those customers. The evidence showed that the plaintiff did not have such responsibility although he was initially told, or in his words, 'assigned' to have responsibility for sales in India. However, eventually a separate team of sales persons was appointed for sales in India and the plaintiff had virtually nothing to do with those sales except to answer technical queries which the Indian salespersons ask of him, mainly to help the Indian sales team complete the works orders. Those were on standard forms and were completed by the Indian sales team. The plaintiff claimed that his contribution was more substantial than that put in by the Indian sales team. However, the evidence did not support this claim. I am of the opinion that the plaintiff's assistance was, on the evidence, small. He merely copied technical details of the equipment for the sales team's use. I accept the defendant's case that this was part of the general duties of the plaintiff as an employee. Commission under the contract were payable only if the salesperson made the sale.

4 In the circumstances, I am of the view that the plaintiff was not entitled to the commission claimed since the evidence showed that the sales in question were made by the Indian team and not by the plaintiff. The plaintiff was not even in charge of the Indian sales team.

5 The plaintiff's claim is therefore dismissed. I shall hear the question of costs at a later date if the parties are unable to agree costs.

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