

An appeal

- by -

LNS Enterprises Ltd. carrying on business as Interiors By Carpet One
("Carpet One")

- 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 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2008A/125

DATE OF DECISION: January 14, 2009

DECISION

SUBMISSIONS

Lance Brown	on behalf of LNS Enterprises Ltd. dba Interiors by Carpet One
Joe LeBlanc	on behalf of the Director of Employment Standards
Betty Cherkaoui	on her own behalf

OVERVIEW

1. This is an appeal by LNS Enterprises Ltd. dba Interiors by Carpet One, ("Carpet One"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued October 3, 2008.
2. Betty Cherkaoui worked as a sales person for Carpet One from January 1, 2007 until April 22, 2008. Ms. Cherkaoui filed a complaint alleging that Carpet One had contravened the Act in failing to pay her all wages (commissions), annual vacation pay and compensation for length of service. She also later claimed compensation for work performed assisting one of the principals of Carpet One.
3. The Director's delegate held a hearing into Ms. Cherkaoui's complaint on July 31 and September 10, 2008. Ms. Cherkaoui attended in person. Carpet One was represented by Shane Brown and Lance Brown.
4. Following the hearing, the delegate concluded that Carpet One had contravened Sections 18, 63 and 88 of the Act in failing to pay Ms. Cherkaoui wages and compensation for length of service. He determined that Ms. Cherkaoui was entitled to wages, compensation and interest in the total amount of \$5,764.39. The delegate also imposed a \$500 penalty on Carpet One for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulation*.
5. Carpet One contends that the delegate failed to observe the principles of natural justice in making the Determination. It submits that the delegate made several errors in calculating Ms. Cherkaoui's wages.
6. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal's Rules of Practice and Procedure provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination

ISSUE

7. Whether the delegate failed to observe the principles of natural justice in making the Determination or otherwise erred in his calculations of Ms. Cherkaoui's wage entitlement.

FACTS AND ARGUMENT

8. The facts and arguments relevant to the issues under appeal are as follows.
9. Ms. Cherkaoui was employed as a commissioned sales person. The Determination and record shows that Carpet One prepared two “sales associate contracts” which set out two different commission structures. Although neither document was signed by either Ms. Cherkaoui or Carpet One representatives, it appears that Ms. Cherkaoui’s wages were made in accordance with them. Under the first, she was paid 7% of the sale. Under the second, she was paid on a sliding scale which was predicated on the percentage of profit on each job. The minimum profit before commissions were earned was 21%.
10. Ms. Cherkaoui claimed that she was entitled to commissions on 36 jobs and provided the delegate with invoice numbers, names of clients and amounts of commissions owed on each job. The total claimed amount was \$27,363.21. She testified that she calculated the amount based on documents called “job costing sheets” which showed net profit and commissions payable.
11. Ms. Cherkaoui said that her pay slips were confusing because some showed draws being deducted while others did not. Ms. Cherkaoui submitted her letter of resignation on April 21, 2008, effective April 30, 2008. In that letter she asked for a review of how her final pay would be calculated and requested that the review take place before her termination date. That did not occur.
12. When Ms. Cherkaoui went to pick up her final paycheque, she received, instead, a document called “commission reconciliation” which showed that she had received draws over commissions in the amount of \$3,026.78. When Ms. Cherkaoui questioned Carpet One about the document, it was replaced with a second reconciliation showing her in arrears of \$20,474.58. During her discussions with Carpet One, Ms. Cherkaoui was presented with yet another document showing her in arrears of \$7,863.55. Ms. Cherkaoui testified that she never obtained an explanation for the three different amounts and disputed that she received more in draws than she earned in commissions.
13. At the hearing, Shane Brown testified that although there was no provision for a base salary, employees were entitled to a draw on future commissions on the understanding that the draws would be deducted from commissions once earned. According to Mr. Brown, Ms. Cherkaoui’s draw was \$2,500 per month, and that draws were reviewed every quarter and adjusted if necessary.
14. Mr. Brown provided the delegate with Ms. Cherkaoui’s sales sheet which divided her sales into three distinct time periods, the last being January 1, 2008 to April 30, 2008. Mr. Brown’s evidence was that, according to Carpet One’s calculations, Ms. Cherkaoui was in arrears in the total amount of \$7,863.55. The delegate noted that the information used to produce these numbers was only an estimate and directed Carpet One to produce accurate figures. He also directed Carpet One to produce information that addressed specific jobs Ms. Cherkaoui identified as being outstanding. At the reconvened hearing on September 10, 2008, Carpet One produced figures that suggested that Ms. Cherkaoui was in arrears of \$9,824.25 but indicated that commissions on pending or unpaid accounts would be credited to her to reduce the amount of arrears.
15. Mr. Brown also testified that the amounts submitted by the sales person on the job costing sheets in many instances did not reflect the final cost of the job. The final cost would take into account errors in material costing, installation problems or changes to the work. Mr. Brown said that there was a difference of

\$54,000 between the written sales of Ms. Cherkaoui and her completed sales, which meant that those sales had to be completed by other sales people who would be paid the commissions.

16. Ms. Cherkaoui said that one day after she gave notice she would be leaving Carpet One on April 21, 2008, her job was terminated. Carpet One did not dispute Ms. Cherkaoui's evidence that when she reported for work on April 22, all her files had been removed from her control and reassigned to other sales people. Lance Brown did not deny that he told her that Shane Brown would be responsible for her files. Lance Brown also acknowledged that when Ms. Cherkaoui asked whether there was anything else she could do, he replied "not on those files". Ms. Cherkaoui then cleaned out her desk and left the office. She returned the company cell phone on April 23 and had no further communication with Carpet One until she was told to come by and pick up a package.
17. Carpet One argued that Ms. Cherkaoui was not entitled to length of service compensation because she had voluntarily quit her employment. Mr. Brown said that no one instructed Ms. Cherkaoui to leave the store and that she could have remained at her desk for the balance of her notice period. Ms. Cherkaoui submitted that, because she worked on a straight commission basis, when Carpet One removed her files they took away her ability to earn wages during her notice period.
18. The delegate noted that commission structures are defined by the contract of employment between the parties and that the Director only reviews them to ensure that they comply with minimum requirements of the *Act*. He further noted that in situations where employees are paid entirely on commissions, it was common to allow employees to draw on future commissions.
19. The delegate noted that the agreement between the parties provided that commissions would be paid only after a 21% profit margin had been achieved. He determined that, according to Carpet One's records, Ms. Cherkaoui was paid a total of \$22,500 in draws between January and September, 2007 while she earned \$11,404.79 in commissions, leaving a negative balance of \$11,095.21.
20. The delegate found that Ms. Cherkaoui earned \$14,303.08 in commission sales for the period October 1 to December 31, 2007 and was paid \$9,080.42 in draws and commissions, leaving her in a positive position of \$5,222.66, according to Carpet One's method of calculation.
21. For the period January to April, 2008, the delegate determined, from Carpet One's records, that Ms. Cherkaoui earned \$13,913.53 and was paid \$17,865.23. The final calculation resulted in Ms. Cherkaoui in arrears of \$9,824.25 for the three time periods.
22. The delegate said as follows:

I have some difficulty in accepting the method used by the employer to arrive at the deficit amount as being accurate. As it was explained at the hearing; commissions are not earned or payable until the job is complete and paid in full. This means that in a lot of cases there may be a considerable lag in time from when the job is written up and submitted by the sales person to when the commission are actually paid to the sales person. This seems to be the case when one looks at the pay stubs; there is in most instances a list of the invoices which were paid and the corresponding commissions earned on those invoices. So the practice of the employer in the second and third periods of subtracting not only the draws taken but also the commission paid in that time from other commissions earned in the same period seems to be to be incorrect.

23. The delegate then concluded that it would be “more accurate and transparent” to divide the draws paid from the commissions earned to determine whether in fact more was taken in draws than earned in commissions. He noted that Carpet One did just that in the first time period. He noted that in the second time period, Carpet One deducted \$9,080 in draws and commissions from Ms. Cherkaoui’s commission sales and that of that amount, \$2,680.42 were earned commissions.
24. The delegate noted that Carpet One had been asked four times to reconcile Ms. Cherkaoui’s account – three times by Ms. Cherkaoui before she filed her complaint and once by him during the course of the hearing, and that Carpet One had arrived at four different amounts ranging from arrears of \$3,026.78 to \$20,474.58.
25. The delegate added Ms. Cherkaoui’s draws from January 2007 to April 2008 and compared that to her commissions earned during the same period. While noting that this exercise would exceed the statutory six month period for review, he determined that the employer’s system of carrying the draws forward through the entire employment period made that calculation necessary to determine whether wages were owed during the last six months of employment.
26. The delegate found that Ms. Cherkaoui had been paid a total amount of \$32,150 in draws between January 1, 2007 and April 15, 2008. Relying on Carpet One’s records, he determined that Ms. Cherkaoui earned \$39,621.40 in commissions during that same period, leaving a balance in favour of Ms. Cherkaoui in the amount of \$7,471.40. Of that amount, he determined that \$4,649.90 was owed and \$2,821.50 was potentially owed if and when the jobs were paid for.
27. The delegate determined that when Carpet One removed Ms. Cherkaoui’s work, it had terminated her employment. He found that although Carpet One did not tell Ms. Cherkaoui her employment was terminated, it altered the conditions of her employment when they removed her files and failed to assign her any other work, effectively removing her ability to earn wages during the notice period. The delegate concluded, under section 66 of the Act, that Ms. Cherkaoui’s employment was terminated and that she was entitled to compensation for the balance of the notice period.
28. The delegate indicated that he was required to calculate Ms. Cherkaoui’s compensation for length of service based on a total of all weekly wages of an employee at the regular wage in the last eight weeks in which the employee worked normal or average hours of work. He noted that, in Ms. Cherkaoui’s case, she did not have a regular wage and her hours of work were not recorded by either party. Therefore, he calculated her average weekly wage by dividing the amount she earned in her last eight weeks of employment by the number of weeks, arriving at a figure of \$693.28. He pro rated this amount to reflect the 10 days Ms. Cherkaoui was entitled to for the balance of the notice period, for a total amount of \$990.40.

ANALYSIS AND DECISION

29. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination; or

(c) evidence has become available that was not available at the time the determination was being made

30. The burden of establishing the grounds for an appeal rests with an Appellant. A disagreement with the result, in and of itself, is not a ground of appeal. An appellant must show clear and convincing reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal.

31. In its appeal document, Carpet One says that "as Ms. Cherkaoui has been overpaid already, an additional overpayment to her, as calculated in the determination, would be a travesty of natural justice."

32. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. The Determination indicates that both parties were given copies of evidence submitted prior to the hearing and evidence presented at the hearing. It also notes that both parties presented their evidence and given an opportunity to ask questions on the other party's evidence.

33. There is no evidence, or assertion, that Carpet One was denied the opportunity to respond to Ms. Cherkaoui's complaint or to fully present its position. I find no basis for an appeal on this ground.

34. Attached to Carpet One's appeal are documents that were not before the delegate at the hearing.

35. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

36. I am not persuaded that Carpet One has met the test for new evidence. The hearing was conducted over two days, the second of which was set in order that Carpet One could obtain information requested by the delegate. At the date of the reconvened hearing, Ms. Cherkaoui had not been employed for approximately six months. I find that was sufficient time for Carpet One to determine Ms. Cherkaoui's commissions and have not considered this "new evidence". However, in light of my conclusions below and my decision to refer the matter back for a new hearing, this information may be relevant to the issues to be considered by the delegate.

37. Carpet One also says that the delegate's calculation of Ms. Cherkaoui's wages is incorrect.

38. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the Act;
 2. A misapplication of an applicable principle of general law;
 3. Acting without any evidence;
 4. Acting on a view of the facts which could not be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
39. Questions of fact alone are not reviewable by the Tribunal under section 112. Carpet One must persuade me that the delegate made legal errors, or factual findings based on no evidence, or a view of the facts which could not reasonably be entertained in determining Ms. Cherkaoui's wage entitlement. (*Britco Structures Ltd.*, BC EST #D260/03)
40. Section 16 of the *Act* provides that
- (1) An employer must pay an employee at least the minimum wage as prescribed in the regulations
 - (2) An employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages in a pay period to comply with subsection (1) in relation to any other pay period.
41. If an employee is paid at least minimum wage for the first pay period of a month because, for example, her commission wages fell below the minimum wage threshold, the employer is entitled, *providing there is an express contractual agreement*, to a "credit" at the end of the month should the employees' total commission earnings for the month actually exceed the minimum wage threshold. An employer may treat wages in any pay period as an "advance" against commissions earned for the month as a whole only where there is a specific contractual provision to this effect. (*Wen-Di Interiors Ltd.* BC EST #D481/99)
42. There was no signed agreement between Carpet One and Ms. Cherkaoui enabling Carpet One to deduct Ms. Cherkaoui's advances against future commissions. The unsigned agreement, drafted by Carpet One, provided "draws will be reviewed on a quarterly basis and adjusted if necessary. Catch up to commission will be done by-yearly (sic)." I find that the delegate erred in failing to consider whether the employment agreement between the parties enabled Carpet One to treat Ms. Cherkaoui's draws as advances against commissions.
43. Section 17 requires an employer to pay an employee all wages earned in a pay period at least semi-monthly and within 8 days after the end of the pay period. Commission wages are no exception. In *Fabrisol* (BCEST #D376/96) the Tribunal found that, for commissioned employees, this requirement is relaxed to some degree, provided that employees are paid some wages semi-monthly.
44. Section 80 (1)(a) of the *Act* provides that the amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of the employment, plus interest on those wages. I find that the delegate erred in reviewing Ms. Cherkaoui's

commissions and draws from the start of her employment. The time period for the delegate's review is October 22, 2007, or six months before the termination of Ms. Cherkaoui's employment. (see *Orca Security Corporation*, BC EST #D003/09)

45. Section 18 of the *Act* requires all wages owing to an employee to be paid within 48 hours if the employment is terminated by the employer. Therefore, all commissions must be paid within 48 hours if they have been earned without regard to when they might otherwise be paid had the employment not been terminated.

46. In *Re Kocis* (BC EST #D331/98), the Tribunal decided that the *Act* does not define when wages are earned and that the entitlement of an employee to a commission is dependent on the contract. The unsigned agreement between the parties provided that Ms. Cherkaoui was to be paid her commissions only upon the accounts being paid in full. In his Determination, the delegate appeared to accept the enforceability of the contract for the purposes of Carpet One's accounting although he did say, in his reply submissions, that Carpet One's practise of writing off unpaid accounts

has the effect of writing off the commissions earned on those sales. The business practice of extending credit to customers carries with it certain risks and bad or uncollected debt is a cost of doing business that sometimes flows from that practice. To then pass some of the cost of doing that type of business on to the employee by writing off the sales raises a question as to whether it violates section 21 of the *Act*, which was not an issue at the complaint hearing.

47. In *Orca (supra)* the Tribunal upheld the Director's ability to allow the complaint process to continue for commission wages that had not yet become available. In light of my decision to refer the matter back to the delegate, the delegate has the opportunity to review all payments made, or not made, to date on Ms. Cherkoui's sales. However, it seems to me that the delegate's submission above is a correct one. Extending credit to a customer carries the risk it may not be paid. That risk should be borne by an employer, or business owner, who has the ability to write off unpaid accounts as "bad debts" rather than an employee.

48. I allow the appeal.

ORDER

49. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated October 3, 2008, be referred back to the delegate to determine the validity of Ms. Cherkaoui's employment contract and to calculate Ms. Cherkaoui's wages according to the statutory provisions and cases set out above.

Carol L. Roberts
Member
Employment Standards Tribunal