

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act S.B.C. 1995, C. 38*

- by -

Profile Marble & Bath Ltd.  
("Profile")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorna Pawluk

**FILE NO.:** 96/727

**DATE OF DECISION:** January 28, 1997

## DECISION

### OVERVIEW

This is an appeal by Profile pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), of Determination No. CDET 004641, issued November 12, 1996. The Director found Profile dismissed Bradley R. Morrice without just cause or notice in lieu and failed to pay Morrice minimum wage for the months of December 1995 and January 1996.

### ISSUE TO BE DECIDED

There are two issues: whether the employer had just cause to dismiss Bradley Morrice and whether the employer failed to pay him minimum wage for December 1995 and January 1996.

### FACTS

Most of the facts in this case are in dispute. It is common ground, however, that on October 10, 1995 Morrice began working as a salesman for Profile, at a base salary of \$1,500, plus commissions. On December 16, 1995, Morrice was placed on a commission basis only.

Profile maintains that Morrice was placed on commission because of "lack of production". They say that after December 16th Morrice stopped working 8 hours per day and payments thereafter reflect his performance. Profile also told the Employment Standards Officer that once Morrice was placed on commissions only, he effectively stopped performing his employment duties. Several instances of lateness or absence were cited and he was not seen from January 16-22, 1996. When he reported to the office on January 22, he said he had been in Toronto; thereafter the parties mutually agreed to part.

Profile submitted notes indicating that on December 6, 1995 at 4 p.m., Morrice said he had to leave the office to pay a doctor's bill and one and a half hours later returned with the smell of beer on his breath. He explained that he had stopped for a beer. On December 7, 1995 a representative of Profile confirmed with the doctor that Morrice had not been there the previous day. On December 14, 1995, Morrice phoned the office at 8:40 (he was to be in at 8 a.m.) to say he had slept in and would get there when he could. He arrived at 12:40 p.m.

Profile also entered a photocopy of an office memorandum dated December 15, 1995 confirming that as of December 16, 1995, Morrice would be on a straight commission basis and was "no longer . . . responsible for cell #970-7129". The writer (and it is unclear who this is as the signature is indecipherable) also concluded that "Brad is

unwilling to produce as a team player, and as such cannot be successful in this venture". Another photocopy of a memorandum dated January 22, 1996 confirms that Profile had not heard from Morrice since January 16 and that he came in almost two hours late on January 22, 1996. Morrice admitted to have been in Toronto and said he had other job offers. The parties agreed to a mutual parting, with payment of commissions when "provide list of Architects contacted" and "any overseas accts Brad to supply up to date info". Another memo dated January 24, 1996 confirmed that Morrice handed in his phone, pager and both front door keys, and produced the lists discussed on the 22nd.

Morrice told the Employment Standards Officer that he had continued to perform his job duties as required by the employer: as a salesman, he was required to be on the road most of the time and while on salary he had to submit sales activity reports to the employer. After December 16, 1995, he dropped into the office from time to time to pick up samples or drop off invoices and orders but submitted no formal sales activity reports.

The Employment Standards Officer found that Morrice had not traveled to Toronto and that he was in Vancouver during the relevant period of time. This conclusion was based on telephone records showing calls from Morrice's house to customers and clients. On the strength of this, she concluded that he had been dismissed without just cause and was entitled to one week's compensation for length of service. She also found that Morrice was entitled to the minimum wage for the period of December 17, 1995 to January 24, 1996.

In order to calculate the minimum wage for December 16, 1995 to January 24, 1996, the Employment Standards Officer assumed that Morrice continued to work 8 hours per day and 5 days per week as the employer did not have a record of the hours worked by its sales employees. Payroll records showed that on December 21, 1995, Morrice was paid \$300 for December 16-21, 1995 and on January 2, 1996 was paid \$516.31. For both of these periods, he was paid in excess of the minimum wage. For the period of January 2-24, 1996, on January 24, he was paid \$259.18 and on February 1, 1996, \$35.00 and \$169.77. On the assumption that Morrice worked 8 hour days, he should have been paid \$840.00.

Morrice says that it is "totally untrue and not substantiated" that he did not contact Profile between January 16 and 22, and as proof produced telephone records showing telephone contact between his home and the office on the 16th and 22nd. He also enclosed a pay schedule showing payment of commissions to him during that period. He cites a Revenue Canada ruling, finding him to be an employee and not an independent sales agent. As for the agreement to be on commission only he challenged the employer "to provide this contract otherwise its totally unsubstantiated". He also denies coming back to the office with beer on his breath and say says "I don't drink & work nor do I drink & drive, and I feel humiliated in even having to address this silly ridiculous accusation."

A determination, dated April 9, 1996, from Revenue Canada found Morrice to be an employee of Profile because he was working on commissions with a minimum monthly guarantee; was expected to work full time in normal business hours; was provided with sales leads; and was required to produce sales reports for the employer. The source of the evidence is unclear from the text of the letter.

A Record of Employment filled out by Profile indicated that Morrice was employed by them between October 10, 1995 and January 24, 1996.

In its submission to this tribunal, Profile argues that all monies owed to Morrice have been paid and that no further monies are owing. They argue that he was dismissed as he did not contact Profile or return any calls or messages during the period of January 16 to January 22, 1996. They also say that he agreed to be paid a commission only during this period.

## **ANALYSIS**

After considering all of the evidence and submissions made on behalf of the parties, I find that Morrice continued to be an employee of Profile until January 22, 1996 but that on that date Profile terminated Morrice for just cause.

The evidence, especially from Profile, is inconsistent with the establishment of a different legal relationship between the parties. While Profile "terminated" Morrice's employment services as of December 16, 1995, he received his base salary on at least one occasion after that and this has not been explained as an oversight or clerical error. More significant, however, is the "Record of Employment" filled out by Profile, which stated that Morrice was employed there from October 10, 1995 until January 24, 1996. It is inconsistent for Profile to now argue that Morrice became an independent sales agent as of December 16th. Morrice says that the Revenue Canada ruling also establishes his status as an employee, but I disagree. First, the Revenue Canada ruling makes a determination for income tax purposes and this has nothing to do with the employee's status under this legislation. Second, the evidence upon which these conclusions were based is not set out in the letter. Consequently, I give that document no weight. Thus, I find that Morrice continued to be an employee of Profile after December 16th. However, I find that the employer had just cause for termination on January 22, when Morrice could not be contacted by Profile.

Regardless of whether Morrice went to Toronto, the fact remains that he could not be reached by Profile from January 16-22. He said he made some calls to customers during that period, but he does not dispute the lack of contact with the office. This lack of contact, together with the numerous problems with his work performance, leads to the conclusion that Morrice effectively repudiated essential terms of the employment contract and thus gave Profile just cause for dismissal.

Finally, the Employment Standards Officer calculated wages owed to Morrice on the basis of 8 hour days, and 5 day weeks. This was reasonable and should be the basis of any new calculations which may flow from this decision on the minimum wage issue.

**ORDER**

Pursuant to Section 115 of the *Act*, I hereby vary Determination No. CDET 004641.

**Lorna Pawluk**  
**Adjudicator**  
**Employment Standards Tribunal**