

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Abba Carpets Warehouse Ltd.
(" Abba ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: James Wolfgang

FILE No.: 2000/082

DATE OF HEARING: March 31, 2000

DATE OF DECISION: April 14, 2000

DECISION

APPEARANCES:

Mel Hewko representing Abba Carpets Warehouse Ltd.
Ken Shultz representing Abba Carpets Warehouse Ltd.
Madelaine MacLeod representing herself

OVERVIEW

A Determination dated April 21, 1999 found Madelaine MacLeod (MacLeod) to be an employee and ordered Abba Carpets Warehouse Ltd. (Abba) pay MacLeod \$10,168.31. Abba appealed the Determination and a hearing was held August 18, 1999. The decision upheld the Determination, however the proper amount to be paid to MacLeod was referred back to the Branch due to mathematical errors.

The delegate did a recalculation and in a letter dated December 31, 1999, awarded MacLeod an amount of \$8,181.83 plus interest of \$945.78 for a total of \$9,127.61

In an undated letter received by the Tribunal January 28, 2000 Abba indicated they agreed in principal with the total amount earned during the period as established by the delegate in his letter. Abba's challenge is based on the fact the delegate failed to deduct the promissory note (principal and interest) from the total shown in his submission.

MacLeod, in a letter dated January 31, 2000, disputed the amount established by the delegate in his December 31st letter. MacLeod had claimed the amount owed by Abba before interest should have been \$8,544.63. This was adjusted at the hearing to \$8,026.43. The delegate issued a clarification in a letter dated March 9, 2000.

Abba did not provide any new information and relied on their written submission to the Tribunal.

A hearing was held on March 31, 2000, which was attended by the parties. The Branch was not represented at the hearing. An attempt to mediate the dispute failed and the parties were invited to make their representations.

This decision is a continuation of File #1999/263. The only issue in dispute is one of quantum. All other matters have been resolved.

ISSUES TO BE DECIDED

Before dealing with the amount owed MacLeod, one must first consider the method of calculation used by the delegate and whether he properly interpreted the *Act* with respect to the payment of wages within a pay period. Secondly, should the promissory note be taken into consideration in determining the amount owed?

FACTS

The delegate created a payroll record, as Abba had not kept payroll records for MacLeod. He established the hours worked in each pay period and applied minimum wage to those hours. He then included all the commissions on sales that were made in the same pay period. He also included the amount of any advances received by MacLeod from Abba in the same period. Where the commissions earned were less than the advance received he deducted that amount from the advance and the remainder was shown as a negative balance for that pay period. This meant MacLeod owed Abba that amount. If the commissions earned exceeded the advance, the amount in excess of the advance was shown as a positive balance. This meant Abba owed MacLeod that amount in that pay period. He then reconciled the amounts in each pay period and showed a positive or negative running balance from pay period to pay period. If at any time the advance or commissions paid exceeded the minimum wage earned, the advance or commissions only were considered. If the advance or commissions did not exceed minimum wage and minimum wage was owed for the period it was kept separate from the running total of commissions and advances.

MacLeod signed a promissory note on June 1, 1996 in the amount of \$6,595.00 plus interest. As indicated on the note, interest of 15% per annum was to be compounded annually and the total would be payable on demand, however such demand would not be made before May 31, 1997. The amount of the promissory note was purported to be the amount of money advanced by Abba to MacLeod from August 1, 1995 to May 31, 1996 less the amount of commissions earned by MacLeod in the same period. She trusted Abba when they stated the amount advanced less commissions was \$6,595.00 and signed the note for that amount. Upon review of her sales records MacLeod claims the amount of the promissory note should have been \$5,859.52, not \$6,595.00 as indicated on the note.

MacLeod claims the promissory note was effectively paid off during a period of maternity leave from December 1996 to June 1997. This was the result of commissions for sales made but not yet paid for by the customer when she went on leave. Those commissions were credited to her promissory note rather than be paid out to her. She received no money from Abba during the period of her leave. MacLeod claims Abba agreed the promissory note was paid in full on her return to work in June 1997 and interest was not considered in any discussions held between Abba and herself.

MacLeod now agrees she owes money on the promissory note, as the delegate did not consider the note in his recalculation.

In their submission Abba agrees in principle with the finding of the delegate but claim he failed to deduct the amount of the promissory note, which they claim, is \$6,595.00 plus \$989.25 in interest for a total of 7,584.25. They take the position that \$1,543.36 is owed to MacLeod by Abba. (\$9,127.61 less \$6,595.00 and interest of \$989.25 equals \$1,543.36).

Abba did not get a signed authorization from MacLeod to deduct money from her earnings to repay the promissory note.

ANALYSIS

Key to the issue of quantum is whether the delegate has properly applied the *Act*, and specifically the application of Section 17. The payroll was created to ensure all activity within the pay period was recorded. To make all of the transactions occur within the limits of a pay period meant commissions had to be applied when they were paid and the advances were applied to the pay period in which MacLeod received them. Much of this did not match the sales or commission sheets which were the only records kept.

Section 17 (1) of the *Act* states:

At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period. (emphasis added)

The definition of “wages” includes salaries, commissions or money, paid or payable by an employer to an employee for work. (emphasis added)

Section 17 (2) indicates what the obligation to pay wages does not apply to. (emphasis added) That means any money owed an employee, except those specific items contained in subsection (2), must be paid within the pay period. This does not allow an employer to carry an obligation for the payment of minimum wage forward or backward to be applied against future or past earnings in other pay periods.

I believe the delegate has properly applied Section 17 of the *Act* in this case and, although there are some minor mathematical errors in his finding, it should stand when corrected.

The requirement to pay minimum wage occurs on three pay periods during the 24-month review by the delegate. In the August 16 to 31, 1996 pay period \$252.00 is owed, in the November 16 to 30, 1996 pay period \$224.00 is owed and in the July 16 to 31, 1997 pay period \$280.00 is owed for a total of \$756.00. (The recalculation dated December 31, 1999 shows \$765.00 but that is simply a transformation of the numbers when printed on the sheet and does not affect the balance.) That amount was properly kept separate from the running total of commissions and advances used by the delegate. To do otherwise would allow the minimum wage earned to be offset by commissions that were not earned in the same pay period.

The delegate was correct in not considering the promissory note as part of the calculation. MacLeod had not signed an assignment of wages as required by Section 22 (4) of the *Act*. If there is an obligation for MacLeod to pay the promissory note it cannot be deducted from any wages without that written assignment. Further the promissory note covers advances made beyond the 24-month limitation in Section 80 of the *Act*.

Section 21 (1) of the *Act* states:

Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee’s wages for any purpose.

MacLeod admits monies are owed to Abba in respect to the advances she received from August 1995 to June 1996. The total of the advances were reduced by the amount of the commissioned earned by MacLeod and the parties are not in agreement of what the proper amount should be. The attempt to mediate was unsuccessful and the relief to the issue of the promissory note must be found outside the Tribunal.

On review, I find there are additional mathematical errors in the calculations and I believe the amount owed to MacLeod to be \$8,036.63 before the application of interest rather than the \$8,181.28 in the December 31, 1999 letter and the corrected amount of \$8,118.80 made on March 9, 2000 in an additional letter.

My investigation indicates errors in the following pay periods:

April 16-30, 1996	487.47	Should be	491.09
May 1-15, 1996	551.60	Should be	555.21
August 1-15, 1996	(58.30)	Should be	54.69
September 16-30/96	691.74	Should be	691.66
June 16-30, 1997	682.93	Should be	862.93
July 16-31, 1997	7,049.28	Should be	6,511.04
September 16-30/97	owed 1,915.99	Should be	1,956.05
	8,324.04	Should be	8,184.95

On the final page the 1/3 of \$2,862.35 should read \$954.11 not \$945.11

The matter of the correct amount of commissions less advances during the period January 1, 1996 to December 31, 1997 is referred back to the Branch for another review.

ORDER

Pursuant to s. 115 of the *Act* I order the Determination dated April 21, 1999, amended December 31, 1999 and further amended on March 9, 2000 be referred back to the Director to be recalculated as indicated above. Additional interest is to be calculated in accordance with s. 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal