**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-

Promacs Management Ltd.
("Promacs")

-and-

Imagine Architectural & Decorative Concrete Ltd.
("Imagine")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE NO.:** 99/109

**DATE OF HEARING:** May 5, 1999

**WRITTEN SUBMISSION RECEIVED:** May 13, 1999

**DATE OF DECISION:** June 16, 1999

## DECISION

## APPEARANCES

| | |
|---|---|
| Don Barron | Legal Counsel for Promacs Management Ltd. and Imagine Architectural & Decorative Concrete Ltd. |
| No appearance | for Roberto L. Farinha |
| No appearance | for the Director of Employment Standards |

## OVERVIEW

This is an appeal brought by Promacs Management Ltd. ("Promacs") and Imagine Architectural & Decorative Concrete Ltd. ("Imagine") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 5th, 1999 under file number ER085-713 (the "Determination"). I shall refer to Promacs and Imagine jointly as the "employer".

The Director's delegate determined that Promacs and Imagine were "associated corporations" as defined by section 95 of the *Act* and that, accordingly, these two firms were jointly and severally liable for $3,188.28 in unpaid wages and interest owed to Roberto L. Farinha ("Farinha"). The delegate found that the employer offered Farinha employment as a sales representative and that he worked from January 5th to March 3rd, 1998 in that capacity. Although Farinha claimed to have worked some 60 or more hours over 6 or 7 days each week of this latter period, the delegate awarded compensation based on a 40-hour work week and a $10 hourly wage rate.

Further, by way of the Determination, a $0 penalty was levied against the employer pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.* The penalty was assessed based on the employer's apparent contravention of sections 8 [prehire misrepresentation] and 17(1) [payment of wages] of the *Act.*

The employer's appeal was heard at the Tribunal's offices in Vancouver on May 5th, 1999 at which time I heard the testimony of John Rehmann, Rolan Richards and Wendy McIlvride, all on behalf of the employer. Although duly notified about these proceedings, Farinha did not attend the appeal hearing nor did he file any written submission with respect to the substantive issues raised by the employer's appeal–Farinha did file a brief (one paragraph) note with the Tribunal regarding the employer's application for a suspension of the Determination pending appeal. Similarly, the Director did not appear at the appeal hearing, however, a written submission was filed with the Tribunal on the Director's behalf.

## ISSUES TO BE DECIDED

The employer raises several grounds of appeal, including:

- Farinha was not an employee as defined in section 1 of the *Act;*
- the delegate erred in finding that Promacs and Imagine were "associated corporations"
- the delegate erred in determining the amount of unpaid wages to which Farinha was entitled.

## FACTS AND ANALYSIS

According to the information detailed in the Determination, Farinha claimed he was "lured" from his previous employer with the promise of a $500 per month salary increase. Farinha claimed that he was hired at a monthly salary of $3,900 to work as the employer's "chief estimator". In his initial complaint to the Employment Standards Branch Farinha alleged that he worked over 60 hours per week during the period January 5th to March 3rd, 1998 but that he was "never paid". As noted above, Farinha did not appear in person at the hearing nor did he file any evidence or submission with the Tribunal in response to the issues raised on appeal.

Very clearly, this case turns on the relative credibility of the parties and I draw an adverse inference from Farinha's failure to participate in these proceedings. Indeed, the evidence before me unequivocally shows that Farinha's apparent version of events is simply not believable.

John Rehmann, who has worked with the employer and related firms for some 5 years, testified that Farinha called the employer's office in early January 1998 saying that he was leaving the industry and wished to sell some contracts that he had secured to install concrete; a meeting was arranged for the first week of January. At this meeting, Farinha did not produce any signed contracts at all–what he did have was a list of names of people who might be solicited for business. Farinha stated that he was presently working with a competitor firm, "Lasting Impressions", but was dissatisfied with that firm. According to the president of Lasting Impressions, Mr. Richards, Farinha had in fact been terminated because he was unproductive and persistently untruthful with customers. Richards testified that Farinha had never been on salary but rather was paid on a commission basis. In any event, Farinha presented a business card at the meeting with the employer (Exhibit 1) which identified him as the president of Roberto Farinha & Associates–Concrete Design and Consultation". This business card also states that he is a "founder" of the "Decorative Concrete Association of British Columbia" but Ms. McIlvride, who has been in the business for a number of years, is not aware of any such organization. Farinha indicated that he wished to be retained as consultant to the employer in order to "drive their sales".

Ms. McIlvride, the president and sole director of both Promacs and Imagine also testified that at the January 1998 meeting Farinha's position quickly changed from "selling a customer database

and contracts" to offering his services as a sales consultant. Farinha made his position clear that he did not wish to be an employee as he had other business interests that he wanted to attend to. After some back and forth, Ms. McIlvride suggested that she was prepared to offer him a 6% commission on all Promacs' sales; the commission would be payable when the customer paid Promacs after the work was completed. Farinha accepted this proposal stating that he would generate $1 million dollars in sales for the year. He claimed to have generated from between $700,000 and $800,000 in sales with Lasting Impressions the previous year but also stated that he had not been paid fully paid for his efforts.

Farinha used his own vehicle, his own computer, his own sales materials and so forth during his relationship with Promacs. He attended the employer's office occasionally and spoke briefly with Mr. Rehmann by telephone most days. According to Ms. McIlvride, Farinha did bring one small $350 contract to the employer and assisted in quoting on a few potential jobs. However, frustrated with the lack of sales, Ms. McIlvride quickly tired of Farinha's excuses as to why he was not able to generate any sales; she and Farinha began to bicker and Ms. McIlvride came to the conclusion that Farinha was not actively seeking out new customers. Matters came to a head in mid-February when Ms. McIlvride directed her associate, Mr. Phil Braendel, to meet with Farinha to determine exactly what Farinha had been doing over the past several weeks.

This meeting resulted in a list of contacts that Farinha had allegedly made on Promacs' behalf. Mr. Braendel prepared a form entitled "Lead Sheet and Meeting Summary" (Exhibit 3) and these forms were completed during the meeting. These forms, 23 in number, were supposed to document Farinha's efforts on the employer's behalf to effect sales. In fact, for the most part, Exhibit 3 records either sales calls or other activity undertaken by Farinha when he was associated with "Lasting Impressions", or simply detail the name of prospects who had yet to be contacted by Farinha on Promacs' behalf. Indeed, there is no evidence before me of *any* sales activity whatsoever having been undertaken by Farinha on Promacs' behalf. The one $350 contract was already in hand when Farinha first associated with the employer and during his brief tenure with the employer, Farinha did not produce any more sales. I have no reliable evidence before me that Farinha even made any sales calls on Promacs' behalf. The evidence before me shows that, in many cases, the sales calls that Farinha allegedly made on behalf of the employer were, in fact, made on behalf of Lasting Impressions while Farinha was still associated with that firm.

I might also comment that Exhibit 3 represents what *Farinha* maintained was his sales activity on the employer's behalf. I find it inconceivable that such a piddling amount of sales activity (recall that most of this activity was on another firm's behalf), even coupled with his infrequent involvement in preparing job quotations, could have occupied, as Farinha asserted in his original complaint, "60+ hours" per week. In short, such an assertion is preposterous. I understand that after Farinha filed his complaint he provided the delegate with a computer-generated "calendar" that showed additional sales efforts–I do not find this latter document to be a *bona fide* contemporaneous record of Farinha's endeavours, particularly when it was never provided to the employer during Farinha's tenure with the employer.

Shortly after the meeting with Mr. Braendel, Farinha's contract was terminated after Ms. McIlvride discovered that Farinha had applied to reserve two corporate names with the Registrar

of Companies–Imagine Architectural Concrete Ltd. or, alternatively, Imagine Concrete Ltd. (*i.e.*, names virtually identical to the trade name then being used by a Promacs to sell and install "decorative concrete"). At this time, Promacs operated a division for the decorative concrete side of its business that was known as "Imagine Architectural & Decorative Concrete" but this latter division was never a separately incorporated company and was merely described in all letterhead etc. as a "division" of Promacs.

Farinha's application to register a substantially similar corporate name–which I consider to be clear evidence of Farinha's malevolence toward the employer–was filed on February 18th, 1998 but was unsuccessful because Ms. McIlvride instructed her own lawyers to immediately secure the name "Imagine Architectural & Decorative Concrete Ltd." by way of a corporate name change of an existing "shelf company", CRS Corporate Rescue Services Inc. ("CRS") This latter change was finalized in early June 1998. In light of these facts, I find that a section 95 declaration was inappropriate in this case inasmuch as Imagine (or more properly, CRS, as it was known at the material times) was a moribund shelf company totally unconnected with the business of Promacs. CRS and Promacs never carried on a joint business enterprise during the times material to this appeal.

While I find that Farinha was an "employee" as defined in section 1 of the *Act*, I cannot accept the delegate's finding that Farinha worked not less than 40 hours per week on behalf of the employer. Nor can I find that Farinha was entitled to be paid at a $10 hourly wage rate–the only evidence before me shows that the agreement between the parties was that Farinha would be paid a 6% commission on sales and since there was only one $350 sale, Farinha's commission earnings total only $21. However, Farinha is entitled, by reason of section 16 of the *Act*, to be paid not less than the minimum wage for the hours he actually worked. Thus, the question is: How many hours did Farinha actually work for Promacs? Farinha's assertions as to "60+ hours", or even his subsequent downward revision to 48 hours, per week is not credible. The delegate's finding of 40 hours per week is not credible. I cannot find that Farinha worked any more than 10 hours per week on the employer's behalf during the period from early January to February 23rd, 1998 when his contract was terminated. Indeed, Farinha may well have worked even fewer hours. At most, I find that Farinha worked 70 compensable hours (even taking into account section 34 of the *Act*, which in any event, may not apply because Farinha appears to have been a "commercial traveller"–see section 34(1)(l) of the *Employment Standards Regulation* and *Kenneth Rindero*, B.C.E.S.T. Decision No. 053/96) during this period but was actually paid not less than $1000 (and perhaps as much as $1,400) in cash by the employer. Therefore, Farinha's paid earnings exceeded, by a substantial degree, his entitlement under section 16 of the *Act.*

As is apparent from the foregoing, I do not find that the employer failed to pay wages nor am I satisfied that it made any pre-hire misrepresentations. Indeed, while misrepresentations were made, I find that such were made by Farinha, not by the employer. Thus, the $0 penalty must be cancelled.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

_____

**Kenneth Wm. Thornicroft,**
**Adjudicator**
**Employment Standards Tribunal**