

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 -

Super Carpets and Drapery Ltd.

(“Super Carpets or employer”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: Paul E. Love
FILE NO.: 1999/150
DATE OF HEARING: July 12, 1999
DATE OF DECISION: July 21, 1999

APPEARANCES:

Fred Zinn
David Towers

for Super Carpets

DECISION

OVERVIEW

This is an appeal by Super Carpets and Drapery Ltd. (“Super Carpets” or “employer”) of a Determination dated February 22, 1999. The Delegate found that the sum of \$ 696.03 was due and owing for work performed as an inside/outside commissioned sales employee, \$26.27 for unpaid vacation pay, and \$12.95 in interest. The employer argued that Mr. Towers was an independent contractor, that the commissions were not owing, and that it was entitled to deduct from wages amounts paid to the employee’s wife (also the employer’s daughter) that were in the nature of emergency maintenance payments, and amounts for repayment of a loan or payroll advance. The Delegate did not err in determining that Towers was an employee at all material times, and that the employer could not deduct the payments made. The employee consented to the reduction of commissions by the amount of the outstanding loan or payroll advance, and the Determination was varied accordingly.

ISSUES TO BE DECIDED

1. Was Mr. Towers an employee at all material times?
2. Did the Director’s delegate err in the finding of entitlement to commissions in the amount of \$656.81 plus vacation pay in the amount of \$26.27 and interest of \$12.95?
3. Was the employer entitled to deduct the sum of \$151.77 from commission wages owing to the employee, repayable as a loan or payroll advance?

FACTS

Superior Carpets operates a carpet and flooring sales and installation business in Courtenay. Mr. Towers was engaged as a salesman. His duties included sales in the store and outside the store. Fred Zinn, the principal of Superior Carpets was also Mr. Towers’ ex father-in-law. This is an important fact, as Mr. Zinn seeks to offset debts which he paid on or behalf of his daughter from wages owing to Mr. Towers. Such debt payments were made without the authorization of Mr.Towers.

Mr. Towers was employed for approximately two years. He was on a commission basis, with draws. When his commission earnings exceeded his draw, he was paid the additional commission earnings. Mr. Towers had his employment terminated in early September. Mr. Zinn was unhappy

with Mr. Towers' job performance, yet apparently retained Mr. Towers for a further month as an independent contractor. It appears that Mr. Zinn retained Mr. Towers in spite of his better judgement, because of the family relationship, the need to provide his daughter's children with support, and because his wife, and equal shareholder, would not permit him to terminate Mr. Towers.

In its letter in support of the appeal the employer argues more than 9 points of appeal. The appeal points are not clearly identified, and many of the attacks made on the Determination are not matters that appear to be in issue. In particular it is not in issue that the employee failed to fill out time cards, or keep records, or that the employee put in less than 8 hours per day, or that a portion of the work was performed in the field, or that the employee failed to acknowledge receipt of the handbook and the policies it contained, or that the employee left Mr. Zinn's daughter to care for children that were disabled. Given the manner in which the appeal was presented and argued, it is more helpful to focus on the conclusions the Delegate made, and the attacks made on the conclusions, rather than a paragraph by paragraph analysis of the Determination, as appears to have been the approach taken by the employer. The principal issues on appeal, which I have gleaned from the brief, argument and evidence presented are set out above.

The Delegate concluded the following:

Minimum Wage and Overtime Wages:

The Director's delegate dismissed a claim by Mr. Towers for wages based on the store operating hours and a minimum wage. The Delegate was satisfied that there was insufficient evidence to establish an accurate record of work. The Delegate appears to have accepted that submissions of Mr. Zinn, that Mr. Towers was tardy in submitting records of hours worked. Mr. Towers asked that I grant him a minimum wage in the amount of \$1881.49 for those months where he did not achieve an adequate commission based salary, and commissions owing in the amount of \$873.35. He has, however, not filed a formal appeal from the Determination, and therefore I am without jurisdiction to consider his request.

Employment Status:

The Delegate found that Mr. Towers was an employee. There was little cross-examination or argument presented on this point. It is clear, for some reason, which is disputed the employer purported to have Mr. Towers treated as an independent contractor.

Earnings:

Mr. Towers was paid on a commission basis. Attached to the Determination was a print out of the accounts receivable which related to Mr. Towers. His commissions were handwritten on the sheet and circled. The Delegate found that the total amount was \$656.81.

Deductions from Commissions:

The employer sought to deduct from commissioned earnings amounts paid to Mr. Towers' wife (also the daughter of Mr. Zinn) amounts paid for hydro, natural gas, medication and food. The employer paid these items without the consent of Mr. Towers. In my view it was proper for the Delegate to consider the relationship between these parties, as an employer would not pay to an employee's wife a portion of the employee's pay or, ordinarily seek to deduct amounts from pay.

The employer gave wage advances or loans to Mr. Towers. The amount outstanding from the wage advances which has not been repaid by Mr. Towers is the sum of \$151.77. This was admitted by him to be due and owing and he consented to the repayment of this amount from the amount determined to be owing by the Delegate.

While the Delegate did not appear at this hearing, I informed the parties that he could be contacted by telephone, if either party wished to ask him questions. Neither Mr. Towers nor Mr. Zinn wished to ask questions of the Delegate.

ANALYSIS

In this appeal the burden is on the employer to demonstrate that the Delegate made an error such that I ought to vary or cancel the Determination. It is my view that the employer did not clearly present its case on appeal. Perhaps the judgement of the employer was clouded by the personal animosity which obviously still persists between these two parties, which arises in part from an employment relationship and in part from a family breakdown.

Was Mr. Tower an Employee?

The Delegate found that Mr. Towers was an employee. There is a dispute between the parties as to why Mr. Towers was required to become an independent contractor. The Delegate found that the parties colluded in an attempt to prevent Family Maintenance Enforcement from attaching commissions owing to Mr. Towers, on behalf of a previous spouse. Super Carpets vehemently denies this "defamatory comment". It says that it required Mr. Towers to incorporate as a result of advice received from its lawyer. There was little in the way of cross-examination or argument on this point. It is unnecessary for me to rule on the reasons for incorporation or treatment of Mr. Towers as a contractor. It appears to me that Mr. Towers was, at all material times, a commissioned sales person. His only client was the employer. He worked from the employer's business and appears to have been integrated fully into the employer's operation. He carried out the work which was ordinarily carried out by an employee. He devoted his full efforts to his employer's business, although his performance did not meet Mr. Zinn's expectations. I have no hesitation in concluding that the Delegate did not err in his finding that Mr. Towers was, at all material times, an employee of Super Carpets.

Entitlement to Commission Wages:

The employee testified that some commissions remained unpaid to Mr. Towers at the time of departure. A list of these unpaid commissions was attached to the Determination. The sheet had the commissions owing circled. The commissions were generally paid upon completion of the

job and payment by the customer. The only commission attacked by the employer was a commission from a carpet job for Mr. & Mrs. Lefley. Apparently there was a problem with the installation, and so the employer was not paid. The evidence was that Mr. Towers sold the carpet but did not install the carpet. While the employer made a business decision to apparently write off the job, the employee's right to a commission was not affected by this decision.

Mr. Zinn says that he withheld payment of commissions because Mr. Towers went into his office and took a cheque which Mr. Towers had endorsed over to the employer, in repayment of amounts that were payroll advances or loans. The Delegate found these amounts to be loans. The amount at issue is \$151.77. While initially Mr. Towers took the position that he had fully paid the amounts, he admitted during cross-examination that he had not paid this sum, and that he took the commission cheque from Mr. Zinn's office. There is an admission by Mr. Towers that this amount remains unpaid. Given that Mr. Towers concedes this amount should be repaid, I vary the Determination by reducing it by \$151.77.

Since the employer has not otherwise demonstrated any errors made in respect of the commissions, I am not prepared to disturb the findings of the Delegate.

Deductions from Commissions:

It is apparent from the *Act* that an employer may not make deductions from earnings without the express written authorization of the employee. Section 21 of the *Act* reads as follows:

21 (1) 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.

Pursuant to section 22 of the *Act*, the employee can make certain written assignments of wages, and the Director may authorize certain assignments of wages.

It is up to the person claiming the benefit of the withholding or deduction to demonstrate that the item claimed falls within the permitted exceptions to the *Act*. The payments made, for medication, hydro, gas and food, do not fit within any of the exceptions set out in the *Act*. It is clear that no authorization was ever given by Mr. Towers. The fact that Mr. Zinn or his wife, both officers of the company, made payments to their daughter which the employer says should have been the responsibility of Mr. Towers, does not alter the fact that there was a breach of the *Act* by the employer.

Repayment of Loan or Payroll Advance:

The Director found that the employer had made personal loans in the approximate amount of \$328.00 to Mr. Towers. The Director found that Mr. Towers was opposed to the repayment and that there was no requirement to repay these amounts from the commission earnings. Both parties

agree that the amount of money advanced was \$358.00, not the amount stated in the Determination. Both parties agreed that the sum of \$151.77 has not been repaid. Mr. Towers has agreed that these monies should be deducted from the amount of money otherwise owing to him. I took this to be a concession that the amounts were in the nature of a payroll advance. As a result of the consent of the parties I reduce the amount of the Determination, without a finding as to whether the Delegate was correct in the manner in which he dealt with this item.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated February 22, 1999, be varied to the sum of \$544.26 plus vacation pay and interest calculated in accordance with the *Act*. The Determination is otherwise confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal