

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.: 1999/263
DATE OF HEARING: August 18, 1999
DATE OF DECISION September 2, 1999

DECISION

APPEARANCES

Ken Shultz	for Abba Carpets Warehouse Ltd.
Mel Hewko	for Abba Carpets Warehouse Ltd.
Madelaine MacLeod	for herself
Ian MacNeill	for the Director

OVERVIEW

This is an appeal by Abba Carpets Warehouse Ltd. (Abba) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination dated April 21, 1999. The Determination found MacLeod was an employee and Abba had contravened certain provisions of Part 3 and 7, specifically Sections 16 and 58(3) of the *Act* and ordered Abba to pay MacLeod \$10,168.31. Abba claims Madelaine MacLeod was not an employee within the meaning of the *Act* but was employed as a “Business Associate” or a “Sales Associate” (both terms were used to describe MacLeod’s position). Abba takes the position that even if MacLeod is an employee there are errors in the Determination. Abba admits they owe MacLeod certain monies relating to commissions on sales made by her that were not finalized before she left. Abba sought to change the rate of commission from 50% to 10%. MacLeod is claiming minimum wage for 1996 and 1997, her advance payment for the month of December 1997, unpaid commissions, vacation pay and two weeks pay in lieu of notice. The Determination also assessed a penalty of \$0.00.

ISSUES TO BE DECIDED

Was MacLeod an employee of Abba and, if so, is she entitled to minimum wage for the time she was employed in sales? If she was an employee, can the rate of commission be changed retroactively?

FACTS

MacLeod was employed by Abba from March 1, 1995 to December 31, 1997. She was interviewed and hired by Ken Shultz, the Secretary/Treasurer of Abba and Mel Hewko, one of the Directors. For the first few months she was hired as a sales secretary. She was paid on a monthly basis plus 25% commission on any sales she made. On July 1, 1995 her position changed to an outside sales person. Abba claim MacLeod was offered a choice of paying a “desk fee” and keeping 100% of the gross profit or becoming a Sales Associate and receive 50% of the gross profit. MacLeod contends she was only offered the 50/50 proposal.

MacLeod was employed in the Duncan office with two other sales staff. Each sales person was provided a desk, telephone, samples, sales forms etc. In this position she was paid a straight commission of 50% of the gross profit with bi-monthly advances of \$750.00. Her commissions were paid on the 15th of the month following the month in which they were earned on a completed sale. In the event the amount of her commissions were below her advance in a given month she would continue to receive the advance and a running total was kept of the amount she owed the company. This money was to be recovered from future commissions.

MacLeod requested Abba make deductions from her pay for CPP, EI and Income Tax and Abba agreed.

By June 1996 she owed a considerable amount to Abba and went on a straight commission basis until the end of November 1996. She was requested to sign a promissory note for the outstanding amount, which she did. In November 1996 MacLeod was laid off at her request and took maternity leave until May 1997. As commissions were not paid until a project was finalized and the money received by Abba it could be some time from the date of the sale until the commission was paid. The commissions she had earned on sales made before leaving on maternity leave had offset the amount she owed Abba from advances received.

When she returned from maternity leave she worked one month on straight commission with no advance. As she wanted a steady income she requested to be put on a monthly salary. Abba offered a return to the monthly advance system and MacLeod agreed. MacLeod was paid a \$1600.00 mid-monthly advance on commissions and remained on that system until December 31, 1997.

Neither Abba nor MacLeod kept any record of hours worked. Abba admits they did not pay minimum wage or keep a record of hours for “Sales Associates” as they are not employees within the meaning of the *Act*. The sales staff invoiced Abba at the end of each month for the finalized sales for that month and the commission would be paid on the 15th of the next month. The Determination found Abba had violated the *Act* for not keeping records and for failing to pay wages within the proper time frame.

Sales Associates, according to Abba, are free to set their own hours of work, may vary the selling price of a product to make a sale, do not have any deductions for any benefits, and make their own contacts. MacLeod was the exception as she had requested CPP, EI and Income Tax be deducted from her commissions and Abba had agreed to do so.

MacLeod claims the business hours when she was first hired were from 8:00 am to 5:00 pm, Monday to Friday. This notice was posted in the window of the store. The three salespersons were expected to work out an arrangement whereby at least one sales person would be in the store at all times although this was not always the case. The remainder of their time would be making outside sales calls on potential customers or doing follow-ups on orders in progress. Following MacLeod's return from maternity leave she changed the posted sign to read: Business hours 8:00am – 5:00pm Mon-Fri. and Office hours 10:00am – 2:00pm Mon – Fri. MacLeod said this was done as she was the only sales person remaining at that store.

The claim by MacLeod is for minimum wage for all hours worked offset against any commissions earned. As no record of hours worked exists, the delegate created a payroll using a two-week period and attempted to credit the commissions on any completed sales in that period to the gross amount owed. For example, if the minimum wage earned was \$560.00 for the two-week period and MacLeod had commissions of \$500.00, she would receive \$60.00 in addition to her commissions. If her commissions exceeded the minimum wage requirement, she would receive commissions only.

MacLeod also claims she did not receive all her commissions for sales completed in May 1997. She is claiming \$433.07, which has not been paid. Abba takes the position they have no record of that invoice.

Abba claims there are mathematical errors in the Determination and some of the commissions are incorrectly calculated. Abba has indicated if MacLeod were found to be an employee they would be prepared to pay her minimum wage but reduce the commission payable to 10%.

On December 31, 1997 Abba ceased operations and a new company, Abba Carpets (1997) Inc., took over the business January 1, 1998. This included the existing Abba staff. The staff was advised in mid-December of the change in the status of Abba and informed that Abba would pay any commissions earned in 1997 when the sale was completed.

Following the takeover by the new company, MacLeod made a claim against Abba for money she felt was owed to her. Employment Standards advised MacLeod that employees were entitled to minimum wage whether they were paid by the hour or by commission and MacLeod revised her claim.

ANALYSIS

The primary question is whether MacLeod was an employee of Abba. There has been considerable evidence developed to assist in determining if a person is an employee. Specifically dealing with contract or commission employees I found reference in: Sewak BC EST #424/97, Christopher Sin BC EST #D015/96 and Stirrett BC EST #D019/98. Several decisions by adjudicators point to the fact the *Act* is to be given a liberal interpretation.

Section 1(1) of the *Act* defines an:

“employee” as:

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee

“employer” includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee;

“wages” include:

- (a) Salaries, commissions or money, paid or payable by an employer to an employee for work,
- (b) Money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,

“work” means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.

It is clear that Abba employed MacLeod in a sales position. Abba interviewed and hired MacLeod first as a Sales Secretary and later changed her position to an outside sales person they referred to as a “Sales Associate” or “Business Associate”. As a Sales Secretary she received a salary and a commission of 25% on any sales made by her. As an outside sales person she received a 50% commission on finalized sales. MacLeod was selling goods and services to customers of Abba, using Abba sales forms. Abba billed the customer and the customer paid Abba. When the final payment was received MacLeod would invoice Abba for her commission. As indicated in the *Act* the payment of wages includes commissions.

The fact MacLeod had more flexibility in determining her hours did not exclude her from being an employee. The general hours of operation were posted in the store window and someone was expected to be available for walk-in customers.

In addition, the question as to whether MacLeod is an employee can be evaluated against the “four fold test” of (1) control, (2) ownership of tools, (3) Chance of profit/loss, and (4) integration.

Abba hired MacLeod and could have terminated her. The control exercised by Abba included establishing the rate of commission to be paid. Abba set the rate of commission MacLeod was paid as a Sales Secretary. Abba also set the rate of commission for an outside sales person. They claim MacLeod was given two choices when hired, either pay a desk fee and keep 100% of gross profit or receive 50% as a Sales Associate. In both cases these were rates set by Abba, not by MacLeod. These were Abba’s commission rates. This was clearly evident in the fact Abba sought to change the rate of commission retroactively from 50% to 10% when confronted with the position MacLeod was an employee. Abba felt they had the authority to make such changes. That would only be possible if Abba believed MacLeod was their employee. The term “gross profit” as Abba uses it is a bit of a misnomer, as I believe it is really the “net profit” after expenses.

Abba indicated MacLeod was free to sell a similar product for other companies while employed by Abba. In cross-examination, Abba indicated if an employee did sell a similar product for another company it “would not be in their best interest”. I doubt Abba would continue to employ a sales person who was also selling the same or similar products for another company

Abba supplied the tools for MacLeod. It was their showroom and she was provided with a desk, telephone, fax machine, invoice and business cards.

MacLeod had no chance of profit or loss. As a commission sales person she received a fixed amount on finalized sales. She could increase or decrease her earnings by the amount she sold, as could any commission sales person. If a customer failed to pay for a contract MacLeod did not receive commission on that sale. That was not a business loss; it was a reduction in the amount of commissions for that month.

The sales staff at the Duncan store was fully integrated into Abba’s business. They represented themselves as being agents of Abba. They worked from the showroom when doing outside sales and it had been suggested by Abba they work out among themselves the staffing schedule to provide coverage in the store at all times.

I confirm the Determination in finding MacLeod was an employee within the meaning of the *Act* and is entitled to minimum wage for the time she was employed as an outside sales person. The delegate found it very difficult to compile a payroll with any degree of accuracy, however, using all the records available, he was able to develop a composite payroll and, except for errors in math, it will be used to calculate the hours to be paid.

Abba admits they did not keep records of hours worked by the outside sales staff. They also admit they did not pay minimum wage to MacLeod and believe they are not required to do so as they claim she is not an employee. These were violations of the *Act*. The claim of a complainant should not fail because the employer has failed to meet the requirements of the *Act*.

I have not given weight to the fact MacLeod had deductions for Income Tax, CPP and EI made by Abba. They are not determinative of whether a person is an employee or not and further they were made at her request for other reasons.

There were challenges by both Abba and MacLeod as to the accuracy of the sales commissions in the Determination. That is to be referred back to the delegate for further investigation and calculation. Specifically MacLeod raised the question of a missed commission cheque for May 1997 in the amount of \$433.07 and there is a dispute over the sharing of contract No. 97032. Abba indicates it was to be split 2/3, 1/3 with MacLeod receiving the 1/3. MacLeod claims that commission was to be split 50/50. MacLeod claims she has not received commissions on Contract Nos. 97-034, 041, 021, 027, 023, 037 and 040 in the amount of \$800.42. Finally MacLeod indicates Abba has over calculated the commissions for December 1996 to May 1997. In their recap, Abba had determined MacLeod had received commissions in the amount \$8,596.56. MacLeod indicates an amount of \$6657.92, a difference of \$1938.64 in favour of Abba.

Abba has done a recalculation of monies owed to MacLeod, if she was an employee, using a 37.5 hour week and commission at 10% of net profit. As the hours of normal business, as posted, was 8:00 am to 5:00 pm the normal workweek would be 40 hours, not 37.5. Abba introduced the commission rate of 10% in response to the Determination. It had not been discussed with MacLeod before she was transferred to the new company. For those reasons, they are of little assistance in establishing the proper amount owed to MacLeod. Abba did offer to settle on the 10% commission plus minimum wage at the hearing and that was rejected by MacLeod.

I support the finding of the Determination that the rate of commission for MacLeod should be calculated at the rate of 50% of the net profit. The wages of an employee cannot be retroactively adjusted downward. This matter had never been discussed with MacLeod and only came forward as a proposal submitted to the Tribunal.

I have found errors in the calculation of the minimum wage and the commissions payable in the Determination and it is being referred back to the Director for correction and recalculation.

Abba raised the point of the promissory note signed by MacLeod plus interest owing on the amount of outstanding balance. It was the position of MacLeod the outstanding amount was recovered from commissions that were earned on previous sales and credited to MacLeod during her maternity leave. The evidence at the hearing favoured the belief that the outstanding debt was virtually eliminated when MacLeod returned to work and they started out with a “clean slate”. Interest had not been discussed and was only brought forward in Abba’s submission to the Tribunal.

The advance of \$1600.00 claimed by MacLeod as owing for December 1997 was paid and the parties have agreed. It is no longer an issue.

The claim by MacLeod for two weeks pay as compensation for length of service is not a matter for Abba but for the successor company.

ORDER

Pursuant to s. 115 of the *Act* I order the Determination dated April 21, 1990 be referred back to the Director to be varied as indicated above. Additional interest is to be calculated in accordance with s. 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal