

**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 (1997) Inc.  
("Abba")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** James Wolfgang

**FILE NO.:** 1999/279

**DATE OF HEARING:** August 18, 1999

**DATE OF DECISION:** September 9, 1999

**DECISION**

**APPEARANCES**

Mel Hewko	for Abba Carpets
Jennifer Hewko	for Abba Carpets
Ken Shultz	for Abba Carpets
Madelaine MacLeod	for herself
Ian MacNeill	for the Director

**OVERVIEW**

This is an appeal by Abba Carpets (1997) Inc. pursuant to Section 112 of the *Employment Standards Act (the "Act")* from a Determination dated April 19, 1999. The Determination found Abba had violated certain provisions of Parts 3 & 8, specifically Sections 16, 28, 63(2) and 66. The Determination found Madelaine MacLeod (MacLeod) to be an employee of Abba and ordered them to pay her \$526.49. The Determination also assessed a penalty of \$0.00.

Abba employed MacLeod from January 1, 1998 to January 15, 1998. Abba was the successor to the previous company, Abba Carpets Warehouse Ltd, and began operation January 1, 1998.

Abba claims MacLeod was not an employee within the meaning of the *Act* but was employed as an "associate" working at the Duncan store as an outside sales person. Abba admits it did not pay minimum wage or keep any record of hours worked. Abba also takes the position if MacLeod is found to be an employee there are errors in the Determination. Further, they claim MacLeod quit and therefore is not entitled compensation for length of service. Abba made an offer to settle the matter "without prejudice" and MacLeod did not accept the offer. MacLeod's claim is for minimum wage for the time she was employed by Abba, vacation pay and compensation for length of service.

**ISSUES TO BE DECIDED**

Was MacLeod an employee of Abba? Did she voluntarily terminate her employment? What compensation do they owe her, if any?

**FACTS**

Mel Hewko (Hewko), one of the directors of the previous company, Abba Warehouse Ltd., took over the business on January 1, 1998 and began operating as Abba (1997) Inc. Abba is a retail carpet sales outlet with a showroom where sales personnel work in and from. At a general staff meeting in early December 1997 Abba and the former company advised that Abba Warehouse Ltd. would pay the sales staff any commissions on sales made prior to January 1, 1998. Abba would pay for any sales made after January 1, 1998.

The sales staff at the Duncan store was paid a commission of 50% of the net profit on finalized sales. Abba did not pay minimum wage or keep records of hours worked of their sales staff.

Abba had their legal representative develop a contract of employment, which was given to each of the sales staff. MacLeod reviewed her contract and refused to sign, as she had questions about some of the terms. Abba claimed MacLeod was a “sales associate” and not an employee.

MacLeod had been receiving a \$1,600 mid-month advance from the previous company. On January 16, 1998 she met with the new owner and requested her mid-month advance. Hewko informed MacLeod of a change in policy. If no sales were made, no advance would be paid. Abba identified in their letter to the Tribunal dated August 04, 1999 that advances would only be paid on “sold jobs and work in progress”.

MacLeod became upset over this and requested a layoff in order to collect EI. No Record of Employment was issued, however MacLeod went to the EI office and registered. She ultimately was granted benefit based on their investigation.

Abba claimed that MacLeod quit and was not entitled to compensation for length of service.

The Determination found Abba had substantially altered the terms of employment and therefore MacLeod was not disqualified from receiving compensation for length of service while employed by Abba and the former company.

There is some dispute over the actual amount of time MacLeod worked for Abba. Abba argued some of the time MacLeod claimed to be in the sales office the answering service was answering the telephone. Abba had included the invoice from the telephone answering service showing the number of times and the dates the answering service responded to calls. The telephone could be directed to the answering service or set to automatically answer after a certain number of rings.

MacLeod argued that if she was in the showroom with a customer it was not unusual to let the telephone ring through to the answering service rather than interrupt the customer. She also claimed she was making business calls from home and doing site visits therefore was working, but not necessarily at the office.

Abba disputes MacLeod's claim she was in the office Tuesday and Thursdays to receive deliveries from Lone Pine Express, a local delivery firm. Abba supplied copies of invoices from Lone Pine Express to show no deliveries were made to the Duncan store between January 6 and January 15, 1998.

There is considerable confusion in this case as some of the evidence was also part of a claim against the previous company, Abba Carpets Warehouse Ltd. Abba claims MacLeod was using time she indicates she was working for Abba to actually collect outstanding accounts payable by the previous company.

MacLeod admits she did not make any sales for the new company from January 1<sup>st</sup> to January 15<sup>th</sup>. MacLeod initially indicated she took a Christmas break and returned to work January 5, 1998. Abba claimed MacLeod was not at work on January 5, 1998 and MacLeod admitted that was an error.

Abba contends that MacLeod relied on her appointment book to prove that she had been working. It was their position the entries in the book were not made at the time of the event but some eight months later for the delegate. MacLeod admits the entries were made later but were compiled from material she still had in her possession and were accurate. MacLeod claims she left her other records and files in the store when she left and it is difficult to now prove her contacts with potential customers.

After leaving Abba, MacLeod went to the Employment Standards Branch in an attempt to get her December advance, compensation for length of service, some commissions owing from the previous company and vacation pay. MacLeod was advised commission sales persons were entitled to minimum wage and she altered her claim. The only claim against Abba is for wages, vacation pay and compensation for length of service.

Abba filed several letters from the sales staff indicating they were satisfied with the commission arrangement and did not want any changes.

A Determination was issued dated April 19, 1999 in which the Director ordered Abba to pay MacLeod \$526.49 for wages, compensation for length of service, vacation pay and interest.

Abba appealed the Determination disputing the claim for wages and compensation for length of service. They also claim there are errors in the Determination.

**ANALYSIS**

Section 96 of the *Act* provides that the employment of an individual is deemed to be uninterrupted by the purchase or sale of the business. When a company purchases another company, it acquires both the assets and the liabilities. In the case of employees, that liability includes the past service with the former company.

The primary question is whether MacLeod was an employee of Abba within the meaning of the *Act*.

There was evidence Abba considered MacLeod to be part of their sales staff. They had ordered business cards for the sales staff, including MacLeod, in the name of Abba and she had been requested by Abba to attend a sales presentation by one of the carpet suppliers in Nanaimo on January 15, 1998.

There has been considerable evidence developed to assist in determining if a person is an employee. Specifically dealing with contract sales 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.

Section 66 of the *Act* provides:

If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

The cancellation of the mid-month advance unless sales had been made constituted a substantial change of employment and the Determination found MacLeod was entitled to compensation for length of service in accordance with Section 66 of the *Act*. That part of the Determination is upheld.

There is no doubt in my mind that MacLeod was an employee of Abba and I confirm that finding. The only other question is whether the Determination can be relied upon to establish the number of hours she was employed from January 1, 1998 to January 15, 1998.

We have no evidence of any records of hours being kept, either by Abba or MacLeod. The delegate attempted to determine the number of hours worked by using the information available, such as telephone records, daybook and appointments. There were two days in MacLeod's submission in which she claimed to have worked for Abba, January 5<sup>th</sup> and January 8<sup>th</sup>, 1998. Abba challenged that MacLeod was working on those days and MacLeod admitted those dates were claimed in error. I believe the delegate had incorrectly included four hours work for each of those days in his calculation of time worked. There were also mathematical errors, which have been corrected.

The Determination is therefore amended by reducing the 56 hours to 48 hours to be paid at \$7.00 per hour for a total of 336.00. That will also change the vacation pay from \$18.76 to \$19.07.

The new calculation is as follows:

Wages January 1-15, 1998	
48 hours @ \$7.00	336.00
Compensation for length of service 2 weeks @ \$70.40	<u>140.80</u>
Sub-total	476.80
Vacation pay @ 4%	<u>19.07</u>
Total before interest	495.87

Those are the only errors I have identified and, except as indicated above, I believe the information in the Determination is accurate enough to satisfy the claim.

Abba had submitted letters from four sales persons agreeing with the fact Abba does not make deductions from their commissions and they wish to remain on that system. I do not believe this claim was over deductions to be made from money owed to employees. The question was whether MacLeod was entitled to minimum wage for hours worked. The Determination found MacLeod, as an employee, was entitled to minimum wage for hours worked offset by any commission earned. The other employees have not addressed that in their letters and it is of little consequence. Two parties cannot make an agreement to violate the terms of the *Act*. The provisions of the *Act* are minimums and two parties cannot agree to do anything less.

MacLeod was not aware she was entitled to minimum wage until after she had left Abba. The fact she did not have any sales in January was not an attempt to receive pay without working. There were rumours about the future of the Duncan operation, which MacLeod admits were disturbing for her as she had a large financial responsibility to meet. That uncertainty may have dampened her enthusiasm but it cannot, without additional evidence, be used to claim she was not performing her job.

**ORDER**

In accordance with Section 115 of the *Act* I confirm the Determination dated April 19, 1999, subject to the changes outlined above. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

**James Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**