# 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 -

Boss Carpet World Inc.
(" Boss Carpet ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE NO.:** 2000/259

**DATE OF HEARING:** July 13, 2000

**DATE OF DECISION:** August 8, 2000

## DECISION

### OVERVIEW

Boss Carpet World Inc. ("Boss Carpet" or "the appellant"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), has appealed a Determination by a delegate of the Director of Employment Standards (the "Director"). The Determination, dated March 16, 2000, orders the appellant to pay David Hall ("the Complainant") the minimum wage, length of service compensation and other wages, a total of $2,413.59 including interest.

Boss Carpet, on appeal, claims that the Determination is wrong in that Hall was not its employee but engaged as one would hire an independent contractor. Beyond that, the appellant claims that even if Hall is an employee, he is not entitled to wages as set out in the Determination.

### APPEARANCES

| | |
|---|---|
| Bosco Wong | On behalf of Boss Carpet |
| Hara Wong | Witness for Boss Carpet |
| Anna Wong (no relation) | Interpreting for the Wongs |
| Debby Chang | Witness for Boss Carpet |
| David Hall | On his own behalf |

### ISSUES TO BE DECIDED

The matter of whether Hall is or is not an employee is at issue. On that it is said that the delegate is wrong on the facts. Should it be found that Hall is not an independent contractor but an employee covered by the *Act*, the amount of the Determination then becomes an issue. On that, Boss Carpet claims that the Determination overstates total hours worked, that the verbal agreement on pay is valid and binding, that it did not terminate Hall or, at least, had just cause, and that it should be allowed to deduct certain expenses. What I must ultimately decide is whether the employer has or has not shown that the Determination ought to be varied or cancelled for reason of an error or errors in fact or law.

### FACTS

Boss Carpet is a retail seller of carpet and other flooring products. The business is owned and operated by Bosco and Hara Wong.

David Hall and Bosco Wong worked, years ago, for the same flooring outfit. Hall had heard that Bosco Wong had gone into business for himself and, needing work, he decided to see if Bosco Wong might have a job for him. Not long after that, Hall, in some capacity, started selling carpet and other flooring products for Boss Carpet.

It is Bosco Wong that set the rate of pay, 40 percent of the net profit on each sale. That is higher than what retail salespeople in the carpet industry commonly receive.

Boss Carpet did not remit Canada Pension Plan ("CPP") or Employment Insurance ("EI") premiums. A T4A was prepared for Hall, not a T4.

Hall was provided business cards by the appellant but he was charged for the cards. Those cards have him listed as a representative of Boss Carpet.

There is no dispute over the above but almost all else of what the delegate has found to be fact is disputed by the appellant.

The appellant claims that Hall operated his own business, had customers outside of Boss Carpet's customers and that he was free to sell the products of its competitors. But on that the appellant does little more than claim that Hall was hypothetically able to do this and that. It is not shown that Hall actually sold anything for a competitor or any product which he obtained from a competitor. Nor is there is evidence showing that he was reselling flooring products and/or other products bought from wholesalers and/or manufacturers on his own account. All that I am shown is that Hall installed a small amount of hardwood flooring for a Mr. Hobbs. But the flooring was purchased from the appellant, Hall has all along claimed that he did the installation as a favour to Hobbs, an acquaintance of his, I am not provided with reason to disbelieve what he claims, and, most importantly, I am not satisfied that the work that Hall did for Hobbs was part of a plan to go into business for himself as an installer. It is extremely unlikely that a man of his age and experience would decide to do that. Hall knows how to sell carpet and other flooring products and that is what he did in the time that he worked for the appellant. He almost exclusively, if not exclusively, sold carpet and other flooring products for Boss Carpet.

According to Hall and the Determination, it was Bosco Carpet that set the hours of work. Hall is said to have worked two days a week at the outset of the relationship and, later, four days a week. According to Boss Carpet, Hall was free to work whenever and as much as he wanted to. What I find is that Hall could, to some extent, come and go as he pleased but that was for the purpose of seeing the appellant's customers and measuring homes and offices. And I am satisfied that it was Boss Carpet that decided who was going to work in the store on any given day. It was in Boss Carpet's interest to do so. Unless there were enough salespeople on the sales floor to serve its customers, service would suffer and it stood to lose business, but if they allowed too many salespeople on a consistent basis they would be presented with another problem, unhappy salespeople concerned with what they would see as an inadequate chance to earn commissions.

According to the delegate, Hall had only one source of income and that was Boss Carpet. I have not been shown that Hall had any earnings outside of the commissions earned through working for Boss Carpet.

It is claimed that Hall could earn profits or suffer losses. What I find is that he earned only commissions, commissions that rose and fell with changes in the number or nature of his sales. Hall did not have any capital at risk.

The appellant tells me that it "was indifferent to the amount of profit" and that Hall was free to set prices as he wished. I find that it was left to Hall to negotiate the profit on each sale but that Boss Carpet indirectly controlled prices and profits in that it set pay as a percentage of profit. As such, Hall would naturally seek to maximize profits. And I find that when Hall sold flooring below cost to a well-connected customer as a way of thanking the customer for sending customer after customer to Boss Carpet, he was firmly criticized by Hara Wong for doing so. Boss Carpet was hardly indifferent to profits. Indeed, I find that it was in part Hall's lack of concern for profits that led to his termination.

On appeal, Boss Carpet claims that it did not really mean to terminate Hall. I find that it is perfectly clear that Hall was terminated by Hara Wong. Debbie Chang, witness for Boss Carpet, was in earshot of Hall and Hara Wong. She tells me that the two were discussing some of Hall's invoices and the fact that he was making little or no profit on some of his sales when she suddenly heard Hall say "I am not leaving unless you fire me, then I'll go". She then heard Hara Wong say, "Yes, I'll fire you." With that, Hall left, thinking that he had been fired. And I am certain that he had been. Had the appellant not wanted to fire Hall, then I believe that someone would have tried to talk Hall into returning to work. No one did. What Boss Carpet did do was prepare a Record of Employment ("ROE") for Hall. And on the ROE it put "M", which is code for dismissal, as the reason for the termination.

The appellant claims that it was justified in terminating Hall. In that regard, it complains that Hall left for a trip to Toronto and he left customers unattended. And it complains of what he did for Hobbs and of the sale which was below cost. Hall tells me that the trip to Toronto was so that he could be with his mother who was suddenly and seriously ill. I accept that as fact, nothing to the contrary.

Boss Carpet, on appeal, claims that the delegate overstates Hall's work by 159.5 hours. What I find is that neither the appellant nor Hall kept a record of work and that there is no way to determine how many hours were worked with precision. What the delegate has done is to accept that Hall worked at least 2 seven hour days on starting work for Boss Carpet and that he later worked 4 seven hour days. The appellant claims that in doing that, the delegate fails to account for the trip to Toronto and the many times that he left early for the purpose of picking up his daughter at school. Hall counters with a claim that he more than made up for the time that he was away from work by making countless visits to customers in the evenings and on days off. I am satisfied that there was a fair amount of such work. In selling carpet and other flooring products, he would have had to have taken samples out to customers and spent considerable time measuring homes and offices.

The appellant claims that it is entitled to deduct credit card charges of $151.09 (40 percent of $363.19 and $437.99 in wages as a way of offsetting certain expenses. It does not explain why the deductions are allowed.

## ANALYSIS

A purpose of the *Act* is "to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment" (the *Act*, section 2).

Section 1 of the *Act* defines the terms "employee", "employer", "wages" and "work". Those definitions are as follows,

> "***employee**" includes:*
>
> (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 the 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**" includes*
>
> (c) salaries, commissions or money, paid or payable by an employer to an employee for work,
>
> (d) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
>
> (e) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,
>
> (f) money required to be paid in accordance with a determination or an order of the Tribunal, and
>
> (g) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person, … .
>
> "***work**" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*

The Court of Appeal has said that the definitions of employer and employee are to be given a liberal interpretation [*Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170].

> "the definitions in the statute of "employee" and "employer" use the word includes" rather than "means". The word "includes" connotes a definition which is not exhaustive. Its use indicates that the legislature casts a wide net to cover a variety of circumstances."

The definitions are annoyingly circular and they are so broad as to be of limited use in deciding whether a person is or is not an employee. A person may perform work normally performed by an employee yet be clearly an independent contractor. The same can be said of some persons entitled to money for work. There are many factors to consider. As Mr. Justice Josephson of the Supreme Court of British Columbia noted in his decision, *Castlegar Taxi v. Director of Employment Standards* (1988) 58 BCLR (2d) 341, through quoting Paul Weiler, then Chair of the Labour Relations Board [*Hospital Employees' Union, Local 180 v. Cranbrook & District Hospital*, (1975) 1 Can. LRBR. 42 at 50],

> "The difficulty is that there is no single element in the normal makeup of an employee which is decisive, and which would tell us exactly what point of similarity is the one which counts. Normally, these various elements all go together but it is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee ... . But while the legal conception of an employee can be stretched a fair distance, ultimately there must be some limits. It cannot encompass individuals who are in every respect essentially independent of the supposed employer."

Various tests have been developed for the purpose of determining whether a relationship is that of employer/employee or one between two independent contractors. The Tribunal's approach, at least what appears to me to be the prevailing approach, is to consider any factor which is relevant. As I see it, depending on the circumstances, any one or all of the following factors may be of importance:

- The actual language of the contract;
- control over the "what and how" of the work;
- ownership of the means of performing the work (e.g. tools);
- chance of profit/risk of loss;
- the person's remuneration and the source of his or her earnings;
- the right to hire and delegate;
- the power to discipline, dismiss, and hire;
- how the parties perceive their relationship and how it is perceived by outsiders;
- the intention of the parties;
- the degree of integration between the parties; and
- if the work is for a specific task or term.

In this case, I have identified features of the relationship between Boss Carpet and David Hall

that are common to a relationship between independent contractors. There is the lack of remittances to Revenue Canada and the fact that a T4A was prepared rather than a T4. The fact that Hall was paid a higher than normal percentage of profit may also indicate a business relationship. But nothing turns on any of that.

Of far greater importance, indeed, I would say, supreme importance, is Hall's remuneration. According to the Director's delegate, Hall was not even paid the minimum wage and he received minimal benefits. Clearly, that is the very sort of worker that the *Act* is designed to protect.

Minimal wages and benefits will not always indicate that a person is an employee as the term is defined by the *Act*. But, from what I can see, that will almost always be the case, the exception being those rare instances where it is clear that an entrepreneur has decided to forgo income and benefits at the outset of establishing a business in the hope of earning substantially more once the business is up and running. But Hall was not running any sort of business. All he did was sell carpet and other flooring products for Boss Carpet. I am satisfied that he was, plainly and simply, Boss Carpet's employee.

Boss Carpet took steps to make it look like Hall was engaged as an independent contractor, in what appears to have been an attempt to avoid the *Act*'s minimum standards and paying taxes and CPP and EI premiums, but it controlled the what and how of what Hall did as though he were an employee. It paid him wages (commissions). He could earn more if he sold more but that is true of employees who earn commissions and, for that matter, piece rate workers. Hall had nothing invested. Hall was disciplined and terminated by Boss Carpet. Hall would have been perceived by customers, in part because of his business card, as an employee. The business which is Boss Carpet is selling and installing carpet and other flooring products for the general public. It cannot do that without salespeople. They are a necessary, integral part of carrying out the business. And the relationship was very clearly open ended.

Hall is correctly identified as an employee in the Determination. It follows that he is entitled to pay and benefits as set out in the *Act*.

**Status of the Agreement on Pay**

Boss Carpet complains that Hall agreed to pay which was 40 percent of net profit and it suggests the *Act* is over-ridden by that agreement on pay. It is not. The provisions of the *Act* are minimum standards. An agreement which provides for less than the *Act* is null and void.

> *4 The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.*

Sections 43, 49, 61 and 69 have no application to this case as they pertain to union employees.

**Total Hours Worked**

The appellant claims that the Determination overstates the extent of Hall's work. What I find is that it has absolutely no idea of the number of hours that Hall actually worked. No record of his work was ever kept. I am, moreover, satisfied that even if Hall did not work 7 hour days as set

out in the Determination, it is likely that he more than made up for that through visits to customers in the evenings and on his days off. I will not for those two reasons make the requested change to the delegate's hours worked and wage calculations.

**Deductions for Expenses and Credit Card Charges**

The delegate has disallowed deductions for credit card charges and certain expenses on the basis that they are contrary to sections 21 (1) and 21 (2) of the *Act*. Those sections are 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.*
>
> *(2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.*
>
> (my emphasis)

The appellant claims that the deductions should have been allowed but that is the extent of what it does. It has not made any attempt at explaining why that might be so. It has failed to show that the deductions are in some way allowed by the *Act*.

**On the Matter of Termination**

The appellant has alleged that it did not mean to terminate Hall. I have already found, in setting out the facts of this case, that Hall's termination was at the hand of the employer.

The appellant goes on to make the convoluted claim that it had just cause. According to the appellant, it was justified in terminating Hall for reason of his conduct in the Hobbs affair, because Hall sold some flooring below cost and because Hall left for Toronto without first attending to customers. That is to allege minor misconduct and nothing more.

The Tribunal has said that just cause for reason of minor misconduct exists only where the employer shows the following:

a) That reasonable standards of performance were established and communicated to the employee;

b) the employee was plainly and clearly warned that his or her employment was in jeopardy unless such standards were met;

c) the employee was given sufficient time to improve; and

d) the employee did not meet those standards.

It has not been shown to me that a reasonable standard of performance was set, that Hall clearly knew of the standard, and that he was plainly and clearly warned that unless he began to meet the

standard that he would be terminated, much less that Hall actually failed to meet some reasonable standard. I am for that reason upholding the delegate's decision to award compensation for length of service.

In summary, I agree with the Director's delegate. Hall is an employee. He is entitled to the minimum wage and compensation for length of service as set out in the Determination. Boss Carpet is not entitled to deduct credit card expenses and other business expenses as it did. Those moneys are to be returned to the employee.

## ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated March 16, 2000 be confirmed in the amount of $2,413.59 and to that I add whatever further interest has accrued pursuant to section 88 of the *Employment Standards Act*.

**Lorne D. Collingwood**
**Adjudicator**
**Employment Standards Tribunal**