

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, c. 38

-by-

CPC Commercial Petroleum Corp.
("CPC")

and
Trond Johansen
("Johansen")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

Adjudicator: Carol Roberts

File No: 96/324

Date of Hearing: September 30, 1996

Date of Decision: December 9, 1996

DECISION

APPEARANCES

Gordon Lidstone	
Fred Carver	
Ed Dyke	
Maxine Kootnekoff	For the Appellant
Trond Johansen	Representing himself
Michael Taylor	For the Director of Employment Standards

OVERVIEW

This is an appeal, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against Determination No. CDET 000250, issued on May 1, 1996. The Director found CPC to be in violation of Sections 18(1) and 58(3) of the Act in failing to pay Johansen wages and vacation pay.

FACTS

Johansen was hired as CPC's Sales Manager on June 6, 1994 at a salary of \$3500 per month. Because of complaints about his performance, Carver, President of CPC, demoted him to salesperson on November 18, 1994, and placed him on three months probation.

Johansen's employment was terminated by Carver on February 24, 1995 after it was determined that the terms of the probation had not been met.

On June 5, 1995, Johansen filed a complaint with Employment Standards that he was owed wages, vacation pay and severance pay.

On December 21, 1995, the Director's delegate, Taylor, sought information from CPC regarding the complaint. No information was received.

On January 15, 1996, Taylor sent a Demand for Employer Records pursuant to Section 85 of the Act to CPC regarding hours of work and payroll records to be delivered by January 31, 1996. No documents were received by that date.

On February 26, 1996, Taylor once again sought production of those documents to be delivered by March 4, 1996. Although this demand was delivered personally to CPC by Taylor, no documents were provided.

Based on the information provided by Johansen and Taylor's own investigations, including a T4 Supplementary prepared by CPC, Taylor found that no reduction in wages or change in pay structure accompanied the demotion. Based on those findings, he determined that wages of \$1400 were owing. Taylor also found that Johansen was entitled to vacation pay in the amount of \$1226.91 and interest of \$97.32.

Taylor reserved his determination on whether Johansen was entitled to severance pay.

ISSUE TO BE DECIDED

At issue on appeal was whether wages and vacation pay were owing?

ARGUMENT

Mr. Lidstone contended that when Johansen was demoted from sales manager to salesperson on November 18, 1994, his status in terms of remuneration changed from a salaried employee to a commission salesperson effective the next pay period, which was December 1, 1994. Remuneration was to be based on a salary of \$150.00 per week. In addition, Johansen received a commission of \$45.00 for every customer who entered into a contract for one year automatic oil delivery. Mr. Lidstone argued that Johansen's employment was terminated on February 24, 1995 when he failed to meet the conditions of his three month probation period. Mr. Lidstone stated that following Johansen's termination, CPC records indicated that Johansen took draws which were equal to the amount of his wages prior to the demotion. CPC contended that those draws were in excess of Johansen's commissions, and that CPC was owed money by Johansen.

Although Johansen acknowledged his demotion, he contended that he was 'blackmailed' into accepting it, as well as the terms of the probation by Carver, who threatened to report him to the police if he did not comply. He argued that he was not aware his employment status had been changed in any other respect, including the altered method of remuneration.

Taylor stated that he visited CPC offices, examined some records, and took notes of what he examined. However, the company did not provide copies of relevant documents as requested. Consequently, he relied on the T4 Supplementary, as well as Johansen's information in making his determination. The 'employment income' box on the T4 contained figures which Taylor suggested was an indication that Johansen was an employee rather than a commission salesman. Box 42, the box in which commission or other income is recorded, was blank.

ANALYSIS

On the basis of the evidence before me, I find that the determination of the Director is incorrect. On the evidence, I agree that the Determination is based on incomplete information and misinformation. Nevertheless, it is apparent that the situation which led to the determination was brought about by CPC itself when it failed to provide Taylor with the evidence demanded.

Having heard evidence on behalf of CPC from Carver, Dyke, and Kootnekoff, I am satisfied that Johansen's demotion was accompanied by a change in employment status from salaried employee to commission salesperson, effective December 1, 1994.

Although Johansen denied there was any notification that his status changed, I prefer the evidence of Kootnekoff, Carver and Dyke, all of whom testified that Johansen's status went from salaried employee to commission salesperson effective December 1. Both Dyke, who replaced Johansen as sales manager, and Kootnekoff, who prepared the payroll, stated that they were told by Carver of the change as of that date.

In arriving at this decision, I have also relied on the note Johansen made in his diary on January 10, 1995, which states "meeting with Fred - \$3,500 draw against commission now - December 1, 1994". This notation was not satisfactorily explained by Johansen at the hearing, which indicates to me that Johansen was aware of his commission status with CPC as of December 1.

Most persuasively however, Johansen, in cross examining Kootnekoff, repeatedly asked questions relating to "his draw", or "his commission". I have inferred from his line of questioning that he was fully aware that he was a commission salesperson as of December 1, 1994, as well as his terms of remuneration.

In arriving at my conclusion, I have also noted the decision of CPC Commercial Petroleum Corporation v. Trond W. Johansen and Super Save Enterprises Ltd. carrying on business as Super Save Home Heat and Propane, (unreported, April 4, 1995). While employment status was not specifically at issue in that case, Mr. Justice Cowan found that Johansen went from salaried employee to salesperson during the course of his employment with CPC. Johansen was represented by counsel at that trial.

Based on the evidence and on a balance of probabilities, I am satisfied that Johansen was a commission salesperson rather than a salaried employee of CPC. I am also satisfied he was aware of this status on December 1, 1994, and accepted it as a condition of his continued association with CPC.

I also accept that the T4 which indicated that Johansen's remuneration was in the form of wages rather than other income was prepared in error by the new payroll clerk for CPC.

In addition, I find that Johansen's draws were in excess of his commission. Consequently, I find no wages or commissions owing, and allow the appeal.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determinations CDET 002140 and DDET 000250 be cancelled.

Carol Roberts
Adjudicator
Employment Standards Tribunal