

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 -

Karin Schafflik
("Schafflik")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Genevieve Eden

FILE NO.: 96/444

DATE OF HEARING: November 19, 1996

DATE OF DECISION: November 21, 1996

DECISION

APPEARANCES

Peter W. DeMeo	Counsel for the Employer
Karen Eakin	Realtor, formerly with Brown Bros. Agencies Limited
Karin Schafflik	on her own behalf

OVERVIEW

This is an appeal by Karin Schafflik ("Schafflik") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination # CDET 003041 issued by the Director of Employment Standards on June 26, 1996. The Director's delegate (the "Director") found that Schafflik was entitled to an additional week's compensation for length of service plus interest for a total amount owing of \$399.38. The Director dismissed Schafflik's complaint with respect to wages. In this appeal, Schafflik claims that her contract of employment was not fulfilled by Karen Eakin ("Eakin"), a Realtor, in that a five percent commission was not paid to her.

A hearing was held in Victoria on November 19, 1996.

ISSUE TO BE DECIDED

Are wages are owing to Schafflik?

PRELIMINARY MATTER

At the outset of the hearing, Counsel for the Employer raised an objection to the admissibility of a tape recording and transcript of a telephone message left by Eakin to Schafflik. He argued that Eakin had not given permission for her voice to be taped and, therefore, such recording was unauthorized. Eakin believed that such a recording could be interpreted out of context, and therefore, could be prejudicial to her and her business. Counsel further argued that there had not been an opportunity to review the tape recording and that the transcript was not provided until November 12th notwithstanding that a letter from the Registrar of the Tribunal dated October 2, 1996 requested that Schafflik contact her by October 9, 1996 if she intended to rely on the recordings. Moreover, a further letter dated October 28th requested submission of documents not previously disclosed no later than November 5th. Finally, Counsel argued that accuracy of tape recordings was always in question.

Schafflik argued that she had been working out of town and thus unable to retrieve her mail until November 5th; she then required extra time to obtain the equipment necessary to make copies of the tape recording. She stated that the tape recording was not directly related to the outstanding issue of wages, but rather it indicated a general attitude on the part of Eakin to

herself and inconsistencies in what Eakin says and does. She explained that she taped the messages from her answering machine and she and a friend prepared the transcript by listening to the tape and entering the information on the computer.

I noted that in a letter dated October 1, 1996 copied to Schafflik, the Tribunal Registrar stated that the party wishing to rely on tape recordings bears the onus of establishing the relevance and admissibility of the recording. I also noted that, in this instance, the parties were able to adduce *viva voce* evidence on the telephone message and to cross examine on that evidence. Also, I am not persuaded that the method used to produce the recording and transcription ensured an accurate representation. I advised the parties that I was not satisfied that this was an appropriate case in which to allow the admission of tape recordings.

FACTS

Schafflik was employed by Eakin as a Realtor's Assistant from April 20, 1995 to December 28, 1995. Eakin was a Realtor with Brown Bros. Agency Ltd. during Schafflik's employ.

The Determination issued June 26, 1996 states that the Employer had been misinformed regarding Schafflik's entitlement respecting compensation for length of service and had agreed to pay Schafflik an additional week. This was confirmed by the Employer at the hearing.

The Determination also sets out the positions of the parties with respect to wages owing. The Employer's position was that Schafflik was to receive 5% of Eakin's net commissions (after taxes and expenses) after a year of employment as an incentive to long term service. The money was to be paid on an annual basis and not prorated. Schafflik's position was that Eakin was to pay her 5% of her commissions (after GST) at the end of the calendar year, December 31, 1995. The Determination concludes that a copy of an employment contract provided by Schafflik was unreliable as it appeared to have been altered. It notes that a meeting scheduled for June 11, 1996 to examine the original of the contract and discuss the issues in dispute was cancelled by Schafflik who could not be reached as she had not provided a current address and phone number. The complaint with respect to wages was therefore dismissed pursuant to s. 76(d) on the grounds of insufficient evidence.

Schafflik appealed the Determination on July 23, 1996 claiming that her contract of employment was not fulfilled by Eakin in that a five percent commission was not paid to her.

At the scheduled time of commencement of the hearing, I received a phone call from an Officer of the Employment Standards Branch who informed me that he had been advised by his Regional Manager not to attend the hearing. The hearing proceeded in his absence.

There is no dispute that Eakin and Schafflik both signed a Contract of employment on April 25, 1995. There was no one else present at the time. The original contract was submitted in evidence by Schafflik. The Contract is a pre-printed form of five items with blanks to be filled in regarding the terms of employment. The heading preceding the five items reads *For the Period beginning April 21, 1995*. There is also no dispute that the handwriting on the Contract is that of Schafflik. Some of this handwriting merely fills in blanks while on two

items the typewritten words were crossed out and alterations noted. The parties part company on item 5 of the Contract which reads:

*Additional payment of \$ 50 _____ per sales transaction to begin on
May 1, 1995 _____ . + 5% of net commission*

Schafflik maintained that the reference to the 5% commission was already on the contract when both she and Eakin signed it. She stated that she kept the original while Eakin kept a copy. She noted that there was no reference on the contract to a timeframe for payment of the commission but that all five items were under the heading *beginning April 21, 1995*. Her understanding when she was hired, as well as from conversations during her employ, was that the 5% commission would be paid at the end of the calendar year. According to Schafflik, a few months after her hire, Eakin informed her that she could use the commission as a downpayment on real estate if she used Eakin as the realtor. She had also heard Eakin telling others on the phone that she had to make sure she had enough money to pay her at the end of the year. Eakin had also suggested sending her to Eakin's property in Los Cabos in lieu of paying the commission. Also, just a few days prior to her layoff Eakin had told her that the bonus would be paid at the end of the calendar year.

Schafflik also testified as to inconsistencies in Eakin's representations to her. In uncontradicted testimony, she maintained that in Eakin's first telephone message to her on January 16, 1996, Eakin stated she wanted her back. However, on the second telephone message on January 17th, having realized that Schafflik intended to pursue wages owed to her, she then stated she didn't want her back and threatened to change some documentation indicating Schafflik had been fired rather than laid off. Further, her lay off was inconsistent with assurances given her just days before that her job was secure. There had never been an indication that Eakin was unhappy with her services.

Schafflik estimated the amount owing to her for the 5% commission to be \$5,635.06.

Eakin testified that the reference to the 5% commission was not on the contract when she signed it. She claimed the document was altered subsequently without her knowledge and pointed out that the word *commission* was written over a part of her signature. She agreed that the terms of Schafflik's contract included a profit sharing bonus of 5% based upon her (Eakin's) net commissions (after taxes and expenses) as an incentive for team building; however, during the course of the employment interview it was made clear such bonus would only be payable upon completion of one year of employment.

Eakin maintained that the file containing the original contract went missing from the office around the time of Schafflik's layoff and she wasn't sure what had happened to it. She agreed that discussions had occurred during Schafflik's employ regarding the commission, but they always revolved around it being paid in April 1996. She insisted that in discussion surrounding Schafflik's purchase of real estate, she said she would cut her own commission given that Schafflik was an employee. With respect to the Los Cabos offer, Eakin maintained it was clear that, if accepted by Schafflik, she would go in April 1996. In response, Schafflik stated that Eakin's term with the property expired February 1996.

Two other witnesses testified for the Employer, both employees at Brown Bros.: Graham Kendrew ("Kendrew"), Manager of the Real Estate Department since 1984, and Ronald Neal ("Neal") a real estate salesperson at Brown's for 5 1/2 years.

Kendrew recalled Eakin consulting him on the terms of Schafflik's contract. It was clear to him from discussions with Eakin at the time of Schafflik's hire that a 5% commission was to be paid after one year of employment. He recalled telling Eakin one of her faults was to be "too generous with commissions". Kendrew stated he had a copy of the contract at the time Schafflik was hired, but apologized for having since "gotten rid of it". He could not recall whether the reference to the 5% commission was on the contract as his main concern was that there was a signed agreement. Had he noticed it, it would have triggered a reaction as his understanding was that the commission would be paid after a year of employment. On further query, Kendrew responded that he did not remember whether the 5% reference was on the contract or not.

Neal testified that the primary purpose of the commission was to promote longevity, hence the one year of employment requirement; this was the industry standard. He initially stated it was clear to him the commission was to be paid after one year and he recalled Eakin saying it would be 5% which he thought was high. In later evidence, Neal stated he didn't remember what the percentage was and that the discussion between Eakin and himself was on what the terms "should be". He could not recall seeing the actual contract with Schafflik. Neal added that Eakin was "very generous" in her business practices.

Both Kendrew and Neal gave evidence that Eakin had always been ethical in her business practices. Neal added that she was well respected by her peers and conducted business ably.

ARGUMENTS

Schafflik argued that the evidence seemed to indicate that Eakin was given recommendations by her peers and manager regarding what the terms of employment ought to be, but those recommendations were not communicated by Eakin to her. She stated the intent of the contract had not been fulfilled. She felt that whether Eakin was generous or not was irrelevant to the issue in dispute.

Counsel for the Employer argued that the evidence led by each of the witnesses was clear that Schafflik was to be paid the 5% bonus after one year of employment. Further this was standard for the industry and even generous. He maintained there were inconsistencies in Schafflik's evidence regarding when the document was signed and whether the alterations had been made before signing. Counsel closed by seeking an order affirming the Determination which was accepted by the Employer in its entirety.

ANALYSIS

While Kendrew and Neal presumed to know that the terms of agreement between Schafflik and Eakin included a bonus of 5% of Eakin's net commissions payable to Schafflik after a year, neither were present at the time the contract was signed, nor were they able to recall what was actually on the contract. Further, I found some inconsistency in Neal's evidence in that he first

stated he recalled a specific percentage that would be paid but later said he couldn't remember. At another point in evidence he stated that the discussion between Eakin and himself consisted of what "should be" in the contract.

Having scrutinized the contract carefully, I am unable to determine from the document whether Eakin's signature was affixed before or after the 5% of net commission addition. Although one letter of her signature overlaps the word "commission", I am unable to conclude from the document that this was written over her signature after the fact.

A central issue in deciding this appeal is the credibility of the evidence given by Eakin and Schafflik. I prefer, on balance, the evidence of Schafflik. The employment contract is consistent with her claim that 5% of Eakin's net commissions was payable to her and there is no statement on the contract of any requirement that she be in Eakin's employ for a year to receive this. The Employer was not able to produce a contract or copy that stated anything different.

Both Eakin and Kendrew claimed to have had the subject contract (Eakin the original and Kendrew a copy) after Schafflik's hire, but both testified that they no longer had them. It is difficult for me to conceive that an employer would not keep a copy of an employment contract of a recently departed employee. I cannot comprehend why Kendrew had since "gotten rid of it". There was no explanation given for this. I note that Schafflik was employed at Brown Bros. for 8 months and she filed her complaint just a month after she was laid off. At the time of her complaint, it would be obvious to the Employer that the terms of agreement were in dispute. It would not make sense for Kendrew not to have retained her contract. It is also not clear to me how Eakin could ascertain that the original contract went missing around the time of Schafflik's layoff, that is, how she knew when the contract was no longer there.

Also, I was able to observe Schafflik giving her evidence and responding to cross-examination and she impressed me as a witness. She maintained throughout her testimony that the contract was signed by both her and Eakin after all the amendments were made. I do not find inconsistencies in her evidence as argued by the Employer. Her evidence of inconsistent representations made to her by Eakin on the telephone messages was uncontradicted.

I conclude on the basis of the evidence before me, that the terms of Schafflik's employment included 5% of Eakin's net commission earnings (after taxes and expenses) payable from May 1, 1995. There is insufficient evidence for me to determine the actual amount owing. Schafflik's evidence of the amount owing was an estimate only.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination # CDET 003041 be varied. In addition to the one week's compensation in lieu of service, I order that wages be paid to Schafflik for 5% of Eakin's net commission earnings (after taxes and expenses) payable from May 1, 1995 to December 28, 1995. I refer this matter back to the Director for calculation on the quantum.

Genevieve Eden
Adjudicator, Employment Standards Tribunal