

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

David Hay, operating as Lakeshore Carpets,
Division of the Lakeshore Group
("Hay")

of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Alfred C. Kempf

FILE NO.: 96/532

HEARING DATE: November 27, 1996

DATE OF DECISION: December 10, 1996

DECISION

OVERVIEW

This is an appeal by Hay, pursuant to Section 112 of the Employment Standards Act (the "Act"), against Determination of the Director of Employment Standards (the "Director") issued on August 26, 1996.

A hearing was held in Penticton, British Columbia on November 27, 1996. David Hay represented himself, William French appeared and Donna Miller attended on behalf of the Director.

Hay appealed the Director's Determination that vacation pay was due and payable to French without deduction of an alleged overpayment of wages.

FACTS

Hay operates a carpet and flooring business in Penticton, British Columbia. French was hired as a salaried salesman on May 1, 1995. His salary was based on hours worked. On March 1, 1996 French's compensation scheme was changed to a commission basis pursuant to which he was to be paid 9% of the sales that he was responsible for.

There was no written agreement or description of the commission sales structure. On April 30, 1996 French resigned his employment on short notice. He had received a payment of wages earlier that day.

Hay says that he has overpaid French in two ways:

1. By advancing salary in excess of earned commissions of \$2,915.88. The salary paid was \$4,080.00 resulting in an overpayment of \$1,164.12. Hay says he is not liable for vacation pay on this amount and also says that he is entitled to deduct any vacation pay owing from this amount leaving nothing owing to French;
2. The other reason that Hay offers is not strictly relevant to the appeal - he says that he should not have an obligation to pay full commissions on those sales that had not been fully completed at the time of the resignation of French. Since Hay reluctantly agreed to pay commission on all sales made by French without regard as to whether they had completed, this is an interesting but moot point.

French prepared a schedule of commission entitlement for April of 1996 showing sales in the amount of \$30,638.93. He says that his pay cheque on April 30, 1996 was based upon these sales.

Rick Winchester ("Winchester"), Hay's sales manager, testified that at the end of April, 1996:

"... Mr. French and myself sat down with the sales book to determine what jobs were completed for payment. Again, after much deliberation, Mr. French explained to me that if he did not receive his total amount of commissions on all jobs sold, completed or not, he could not meet his month end mortgage and other requirements. I personally went to my superior and explained Mr. French's dilemma and asked if we could waive the time period on uncompleted jobs, as he was upset at the prospect of not being able to pay off all of his month end bills. The company agreed to pay Mr. French all outstanding amounts, completed or not, as a personal favour, and to show Mr. French that the company was appreciative of his services. A cheque was issued and Mr. French appeared thrilled."

Winchester also testified that the arrangement was that Hay would pay French a draw at the middle of the month and adjust his commissions at month end. At the end of March French was paid \$1,360.00. He was paid \$1,360.00 on April 12, 1996 and \$1,360.00 on April 30, 1996.

None of French's pay documentation indicated he was receiving advances. Hay did not produce any other documentation supporting his argument that the payments to French were advances.

French testified that he understood that there was a draw system in operation and that if he drew more than he earned he would have to make up for the deficiency. He maintains, however, that as of April 30, 1996 he had not been overpaid.

ISSUE TO BE DECIDED

The issue is whether or not French was overpaid and whether or not such overpayment can be deducted from other wages owing (in the form of vacation pay).

ANALYSIS

The evidence is not clear on the overpayment issue perhaps because, as both parties concede, the commission arrangement was new and they were unfamiliar with its operation.

The most difficult aspect of the evidence is Winchester's evidence that he met with French and calculated and paid him commissions based upon sales that French had made. This is difficult to reconcile with Hay's written submission made in support of the appeal saying in effect that there was no agreement as to the amount due to French as of April 30, 1996.

The only way that I can logically interpret the evidence presented by Hay and Winchester is as follows:

1. At the end of March French was entitled to and did receive payment for some commissions earned by him for that month. He was paid by way of a cheque for \$1,360.00 on March 29, 1996 for the period March 11 to March 23, 1996.
2. On April 12, 1996 he received a cheque for \$1,360.00 for the period of March 24 to April 6, 1996. Upon receipt of this cheque of April 12 he would have been paid in full for March and would have received an advance for the month of April.
3. At the end of April French and Winchester met and calculated commission entitlement for the month of April.

It is possible that French received more commission income than he was entitled to, however, Hay has not established that it is more likely than not that he did. There is no onus on French in this appeal to prove his entitlement to the monies paid to him by Hay.

I have given consideration to Hay's evidence that the payment at the end of April to French was conditional upon or made an expectation of commission income to be earned in the month of May. I cannot accept this evidence because the primary discussions were between Winchester and French and it was Winchester's evidence that the payment at the end of April was made on the basis of sales that had been recorded to that date.

I did not receive a satisfactory explanation from Hay or Winchester as to why the calculation of French's commission entitlement as apparently agreed upon between Winchester and French would no longer apply after French left Hay's employ. I cannot help but conclude that at the time of the payments to French in March and April of 1996 Hay did not consider that French would be liable for the repayment of any commissions.

There is also an issue as to whether or not a deduction can be made for an overpayment even if one existed. Section 21 of the Act says that no deduction or withholding can be made from an employee's wages unless the employee has provided a written assignment to "meet a credit obligation". In order to justify a deduction the employer would have to have

identified the payments sought to recovered as advances. Given my finding that there is no established overpayment it will not be necessary for me decide this issue.

ORDER

In summary, I order under Section 115 of the Act, that the Determination #CDET 003802 be confirmed.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal

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