

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 -

Ampex Windows & Doors
("Ampex")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE NO.: 96/545

DATE OF HEARING: December 9, 1996

DATE OF DECISION: December 27, 1996

DECISION

APPEARANCES

| | |
|---------------------------|--|
| Richard A. Fayerman, Esq. | For Ampex |
| David McClelland | Representing himself |
| Nupur Talwar | For the Director of Employment Standards |

OVERVIEW

This is an appeal by Ampex pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against Determination No. CDET 003779, issued August 22, 1996. The Director found Ampex in violation of Sections 17(1) and 18(2) of the *Act* in failing to pay McClelland wages. While the Determination contained no details of the alleged violation, it ordered Ampex to pay McClelland \$13, 085.66, representing unpaid wages for the period May 1, 1996 and July 15, 1996, plus vacation pay and interest.

Ampex appealed initially on the grounds that McClelland was not an employee under the *Act* and that there was no agreement between Ampex and McClelland to pay McClelland a fixed monthly salary. At the hearing, Mr. Fayerman conceded that McClelland was an employee for the purposes of the *Act*.

ISSUE TO BE DECIDED

The issue to be decided in this case is the existence of a contract between Ampex and McClelland to pay him a monthly salary.

FACTS

Ampex manufactures and sells windows and doors. The company headquarters is in New York, and the Richmond store was the first located in Canada. Mr. Robert Shen, executive vice-president of Ampex, came to Vancouver to oversee the opening of the Richmond operation in April 1996. Previously, the company had advertised for staff, and McClelland responded to the advertisement. He met Mr. Shen in December 1995 to discuss possible employment for McClelland. McClelland testified that Mr. Shen asked him to prepare a proposal on compensation. Mr. Shen stated that the standard commission structure in New York is 6 per cent of sales, a higher figure than prevails in British Columbia. In order to attract business, the company was prepared to pay 8 per cent of sales, a decision of Mr. Thomas Chen at headquarters.

Mr. Shen met McClelland on April 9, 1996. McClelland presented a hand-written document entitled "Compensation Package, General Sales Manager, Ampex Windows". The document contained five entries, the first being "\$7,500 per mo. Draw against commission". The remaining entries covered gasoline and cell phone allowances, a car lease allowance, a commission on gross sales of sales staff and a commitment that the sales manager would produce \$1.5 million in sales. The section of the document referring to the monthly draw against commission contained an additional entry, in Mr. Shen's handwriting "\$5,000, 3% commission". The document also contained an entry "Start Date May 1, 1996" and was signed and dated by Mr. Shen.

According to Mr. Shen, the discussion of compensation never included salary, only commission. Company policy is to pay commission staff only after it collects from sales. Ampex was not prepared to pay any salary. As a new company, the safest policy was to tie pay to performance. Mr. Shen signed the proposal to acknowledge it, believing the board of directors would approve the deal. However, Mr. Chen told Mr. Shen that the company would not loan employees any money, which was the effect of paying an advance on commission. In fact, Mr. Shen and Mr. McClelland agreed that Ampex never paid any salary to McClelland, although McClelland was reimbursed for gasoline and cell phone expenses.

Mr. McClelland testified, without contradiction, that Mr. Chen told him on April 9 that Ampex could not manufacture windows until August, meaning that it would be unable to deliver product until August or September. Initially, McClelland was more interested in a draw against commission than a salary, but changed his mind when he realized that he would not be able to sell Ampex products before the fall of 1996. At the time, McClelland was employed by another firm in the industry at a monthly salary of \$2,300 plus 3 per cent commission. He was adamant that he never would have resigned his previous position to work without pay for Ampex for at least three months. He stated that Mr. Shen agreed to pay him \$5,000 per month plus a 3 per cent commission after discussion at the April 9 meeting.

Ampex and McClelland agreed that the company approached him to revise his commission schedule in June 1996. According to Mr. Shen, the Ampex board of directors did not approve the \$5,000 monthly payment contained in the April 9 document, so they proposed a more generous commission structure during the first few months of the company's operations. Evidently under instructions from Mr. Shen, McClelland prepared a document entitled "Commission Structure for Dave McClelland - Sales Manager/Ampex (1996)". This document contained entries for the months of June through December 1996, with a different commission schedule for the first three months and a single schedule for the period of September through December 1996. The initial commission for June was 24 per cent on net sales. Each month following had a lower commission. Both McClelland and Mr. Shen signed the document on June 18, 1996. McClelland stated that Mr. Shen had approached him about the new commission schedule because the company was having cash flow problems and wanted to sell sales contracts to a factor at a discount. McClelland admitted that he did not understand the concept of a factoring and the commission schedule was

extremely generous. For those reasons, he did not question the details of the document and happily signed it as a supplement to the April 9 agreement.

Ampex and McClelland agreed that McClelland did not make any sales between May 1 and July 15, when he terminated his employment. McClelland stated that he came to work daily, punched a time clock and did other work for the company. He arranged one sale, but Ampex could not deliver the product, so the deal was canceled. Mr. Shen stated there were not sales, but seemed to put the blame on McClelland. There was also a difference between them about the work McClelland performed for Ampex during his employment. Although his position was a “sales manager”, McClelland did not hire or train any other sales personnel. According to McClelland, he briefed Mr. Shen on the industry in British Columbia and wrote materials for use by other employees.

Early in July 1996, McClelland asked Ampex for payment of monies owing him, \$10,000. Mr. Chen offered \$2,500, which McClelland refused. McClelland then filed a complaint with the Employment Standards Branch. There was a difference between McClelland and Ampex about the circumstances of the termination of his employment, but this matter was not an issue in the Determination.

ANALYSIS

This case turns on the status of the two agreements between McClelland and Ampex. The Determination itself had nothing to say on this point, referring only to the relevant sections of the statute. In her reply to the appeal, the Director’s Delegate stated that the agreement of April 9 required Ampex to pay McClelland \$5,000 per month, plus commissions and that the June 18 agreement did not alter that obligation.

Section 17(1) of the *Act* requires the employer to pay wages earned semi-monthly. Ampex admitted that it had never paid McClelland for his work, evidently in the belief that he was not an employee. As noted above, Ampex did not advance that position in these proceedings.

Admittedly, the two documents in question have elements of ambiguity, and there were misunderstandings between the parties. However, on the balance of probabilities, I find that the view of the Director’s delegate is correct, for the following reasons.

The April 9 contract provided for a monthly salary to be paid to McClelland. It would be highly unlikely that McClelland would quit a job with a monthly salary of \$2,300 plus commission to join a new company to be paid only a commission, knowing that no product could be delivered for several months. McClelland was accustomed to earning approximately \$80,000 per year in his previous job. There would be no benefit for him to work from May to August or September for no wages or the minimum wage, knowing that it would be unlikely that he could earn any commission income.

McClelland was treated as an employee by Ampex. He reported to work there and was reimbursed for expenses in accordance with the April 9 contract. Ampex implied that McClelland was at fault because he made no sales. This situation continued for over two months, evidently without any action by management of the company. If McClelland did not meet the expectations of his new employer, Ampex could have taken appropriate measures to correct his deficiencies. Ampex continued to pay for McClelland's business expenses from May 1, according to the April 9 agreement.

The June 18 contract did not cancel the April 9 agreement. It referred only to the commission structure, presumably because McClelland was not in a position to earn any commissions in May and June.

Mr. Fayerman proposed that in the alternative to a finding that McClelland should receive the amount in the Determination, he should receive the minimum wage for time worked, i.e. \$7.00 per hour. Apart from the evidentiary problems of determining time worked, there is no evidence that any agreement between McClelland and Ampex existed for such compensation.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 003779 be confirmed.

Mark Thompson
Adjudicator
Employment Standards Tribunal

MT:jej