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 -

Abba Carpets Warehouse Ltd
(“ Abba ”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: James Wolfgang

FILE NO.: 2000/472

DATE OF DECISION: September 25, 2000

DECISION

OVERVIEW

This is an appeal by Abba Carpets Warehouse Ltd. (“Abba”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* from a recalculation dated June 27, 2000 by the Branch of a Determination issued by the Director of Employment Standards on April 21, 1999. The original Determination found Abba owed Madelaine McLeod (McLeod) $10,168.31. Abba appealed that Determination. The adjudicator upheld the Determination but referred the matter back to the Branch because of mathematical errors. The first recalculation was issued December 31, 1999 and awarded McLeod $9,127.61.

Abba appealed that recalculation on the basis the delegate failed to take the promissory note into account. McLeod also challenged the findings of the delegate. A second hearing dealing with Quantum only was held on March 31, 2000 and Decision BC EST #D133/00 was issued April 14, 2000. The adjudicator again upheld the Determination but found errors in the calculation of the amounts owed and referred the matter back to the Branch.

The second recalculation was completed on June 27, 2000 and forwarded to the Tribunal. It found that Abba owed McLeod $9,030.98 including interest to June 27, 2000.

Abba filed a third appeal on July 17, 2000.

Abba is appealing the timing of some of the contracts used in calculating the commissions owed. They are also claiming the commission rate used in the calculation is incorrect. Finally, Abba is claiming they attempted to present the evidence they are now relying on during the hearing on the Quantum Amount and were denied.

ISSUE

Is the recalculation by the Branch dated June 27, 2000 correct?

ARGUMENT

Abba is claiming McLeod went on maternity leave on November 15, 1996 until June 01, 1997. During the time of her maternity leave McLeod wanted to continue to quote and sell contracts with all of the commissions to be used to pay her promissory note. McLeod applied for and received E.I. benefits during her maternity leave.

Abba submitted an Exhibit listing the 10 contracts, which they claim were quoted/sold after McLeod went on maternity leave. They show dates ranging from November 20, 1996 to April 8, 1997, all this within the period of McLeod’s leave.

Abba is also claiming the rate of commission should be based on 50% of Gross Profit over a period of time, not 50% of the profit on each sale. They are claiming the “Gross profit” to be the net amount of profit after losses for cancelled or unpaid contracts are deducted from the profit.

By way of example, Abba submitted a typical calculation using 3 contracts as follows:

Contract #	Cost of goods sold	Labour	Total cost	Selling price	Gross profit
1	1,000.00	500.00	1,500.00	2,000.00	500.00
2	1,000.00	500.00	1,500.00	2,000.00	500.00
3	500.00	200.00	700.00	unpaid 0.00	<700.00>
					300.00

The 50% commission is then applied to the $300.00 providing a commission of $150.00. Using the method used by the delegate on a contract by contract basis the $700.00 loss is not used in the calculation and the Gross profit is $1,000.00. The 50% commission is applied to the $1,000.00 providing a $500.00 commission.

Abba submitted a list of contracts they indicate were used to pay off the promissory note totalling $6,533.95. They further submitted a copy of a contract dated Jan 29th which Abba claims indicates McLeod continued to solicit and sell business during her maternity leave.

McLeod claims she never asked or suggested she would continue selling during her maternity leave. She claims she was unaware until the presentation by Abba that they deducted the cost of any unpaid jobs from the commissions.

McLeod takes the position all contracts completed while she was on maternity leave were on quotes given or contracts signed before she went on leave. She claims there were 19 contracts finalized while she was on leave. Six were existing clients with additional requirements to their projects from before her leave and 13 were quotes given and/or contracts signed prior to her leave. She claims she continued to monitor the accounts, as she was unable to get any of the other sales staff to cover her files. She insists none of the jobs were new business.

The delegate for the Director, in the June 27, 2000 re-calculation, agrees with Abba that McLeod began her maternity leave on November 16, 1996 and reduced the award by $224.00 for the period November 16 to 30.

The delegate takes the position sales made during McLeod's leave do not affect the calculation. If sales were made she is entitled to the commission on those sales. The issue of whether she made new sales while on leave after telling the Tribunal she did not, if true, goes to credibility.

The delegate takes issue with Abba now raising this new sales information. There have been two hearings on this matter and that evidence was not presented then. He takes the position this evidence is inadmissible at this late date.

The delegate indicates the main issue evolves around the outstanding promissory note. The Determination indicates, as no assignment of wages as required under Section 22(4) of the *Act* was signed by McLeod, the note could not be deducted from the amount owed Abba. Abba feels it should be allowed to deduct that note from the amount owing.

THE FACTS AND ANALYSIS

If McLeod continued to quote and sell new contracts while on maternity leave it does not change the finding of the delegate. McLeod denies doing any new business while on leave, however if she did she is entitled to the commissions on those sales. If she were not entitled to them who would receive the commissions? E.I. may have an issue with McLeod if the allegation by Abba is true but it does not alter the case before this Tribunal.

Abba raised the position that "Gross Profit" is the net profit after deducting the unpaid or cancelled contracts from the profit over a period of time, possibly a month. The period of time is not identified in their submission. The salesperson did not receive any commission until after the contract was completed and paid for. If the customer cancelled the order or failed to pay for the contract no commission was paid and that is understandable. Abba appears to have gone further by deducting those losses from the profit available to be divided between the business and the salesperson. McLeod indicated she was unaware this was a practise of Abba.

Section 21 of the *Act* states:

> *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.*
>
> *21(2) An employer must not require an employee to pay any of the employer's business costs except as provided by the regulations.*

The losses if any, arising from the failure to pay for a contract, are part of the cost of doing business and cannot be deducted from the commissions earned by a salesperson.

In his submission to the Tribunal dated June 27, 2000 the delegate indicates the recalculation was completed and forwarded to the parties May 1, 2000. He claims initially the parties agreed the calculations were mathematically correct. Later Abba challenged the payment of minimum wage for the period November 16 to 30, 1996, claiming McLeod was on maternity leave at that time. The delegate agreed with Abba and deducted $224.00 from the recalculation. McLeod claims she did not receive the May 1, 2000 document however she accepts the calculations from the submission of June 27, 2000.

The delegate raised the question of whether the evidence Abba sought to introduce was admissible. I am not going to rule on the admissibility of the documents, as they do not alter the issue before the Tribunal. Had they been introduced at an earlier hearing they would not have changed the outcome.

The key to this appeal is the promissory note. The delegate did not recognize the promissory note in the original Determination for two reasons. The first being the period the alleged indebtedness occurred went beyond the 2 years limitation imposed by the *Act*. The delegate had no authority to investigate and verify any advances that may have occurred before January 1, 1996. The second was the belief the promissory note was based on false information and false accounting by the employer. If the employer had been paying minimum wages during the entire period of McLeod's employment the amount of the note would likely have been quite different.

The original decision found the promissory note could not be deducted from any money owed to McLeod as no authorization had been signed under Section 21 of the *Act*. McLeod's signature on the promissory note is not sufficient to allow for the deduction of those monies.

As indicated in Decision BC EST #D133/00, Abba had written an undated letter received by the Tribunal on January 28, 2000 in which they agree in principal with the amount established by the delegate. Their challenge was based on the fact the delegate did not deduct the promissory note. The amount of that recalculation was $8,181.83 plus interest. That amount was altered in the June 27, 2000 recalculation to $7,803.67 plus interest for a total of $9,030.98 to June 27, 2000. The principal amount is less than Abba had agreed to in January.

There is no doubt in my mind McLeod owes Abba some money and it is less than Abba owes McLeod. McLeod agreed at the March 31, 2000 hearing she owed money on the promissory note although there was a difference in the amount owing. McLeod claims the amount of the note should have been $5,859.52, not the $6,595.00, which is the amount of the note she signed. As has been indicated at two hearings before, the Tribunal cannot deal with the promissory note. Abba and McLeod must find a solution in another forum.

In an appeal before the Tribunal, the burden is on the appellant to demonstrate an error such that I should vary or cancel the Determination. Abba has failed to do so in this instance and the recalculation is confirmed.

ORDER

In accordance with Section 115 of the *Act* I confirm the recalculation by the Branch of Decision BC EST #D133/00 dated April 14, 2000. Additional interest is to be calculated in accordance with Section 88 of the *Act.*

Jim Wolfgang

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Jim Wolfgang
Adjudicator
Employment Standards Tribunal