

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-

Canadian Closet Shops (1986) Ltd.
operating as “Ace of Space”

(“Canadian Closet” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	1999/159
DATE OF HEARING:	August 25th, 1999

BC EST #D388/99

DATE OF DECISION:

September 16th, 1999

DECISION

APPEARANCES

Abdul Samad S. Ebrahim for Canadian Closet Shops (1986) Ltd.
Gary Hanna on his own behalf
Robert Smith on his own behalf

Adele Adamic &
Ivy Hallam for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Canadian Closet Shops (1986) Ltd. operating as “Ace of Space” (“Canadian Closet” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 25th, 1999 under file number ER092-789 (the “Determination”).

The Director’s delegate determined that Canadian Closet owed its former employees, Gary Hanna (“Hanna”) and Robert Smith (“Smith”), the sums of, respectively, \$5,607.53 and \$3,261.10 on account of unpaid wages and interest.

The employer’s appeal was heard at the Tribunal’s offices in Vancouver on August 25th, 1999 at which time I heard the testimony of Mr. Abdul Samad S. Ebrahim (“Ebrahim”), a director and officer of Canadian Closet, Gary Hanna and Robert Smith (by teleconference). Neither the employer, the employees nor the Director called any other witnesses.

Although a single Determination was issued regarding each employee’s individual claim, the two claims are independent and I will thus address the each employee’s award separately.

GARY HANNA’S CLAIM

Canadian Closet operated a business that manufactured, sold and installed “closet organizer” systems. Hanna is one of two principals of Spica Holdings Ltd. (“Spica”), the company that formerly owned all of Canadian Closet’s outstanding shares. By way of a share purchase agreement dated May 1st, 1998--also the closing date--Spica transferred all of its shares in Canadian Closet, and the trade name “Ace of Space”, to Afcan Holdings Ltd. (“Afcan”), a company controlled by Ebrahim. Although Hanna was not a party to the share purchase agreement--the only two parties being Spica and Afcan--the agreement provided for Hanna’s continued employment by Canadian Closet after the closing.

The relevant provisions of the share purchase agreement read as follows:

4.3 GARY HANNA and GERALD PREFONTAINE [Spica's other principal], without compensation except for automobile expenses, shall be available to [Canadian Closet] for the entire month of May, 1998. GARY HANNA and GERALD PREFONTAINE shall each work five days per week and shall organize their schedule between themselves such that at least one of them shall be in attendance at the office of [Canadian Closet] from Monday to Saturday.

4.4. GARY HANNA, for a gross salary of \$4,000 per month plus automobile fuel expenses, shall continue to work for [Canadian Closet] for an additional two months commencing June 1, 1998. During this two month period, GARY HANNA shall work at least five days per week.

There is now ongoing litigation in the B.C. Supreme Court between Spica, Afcan and other related parties with respect to the share purchase agreement [Spica Holdings Ltd. v. Afcan Holdings Ltd., B.C.S.C. Vancouver Registry No. C986111 and Afcan Holdings Ltd., Canadian Closet Shops (1986) Ltd. and Abdul S. Ebrahim v. Gary Hanna and Gerry Prefontaine, B.C.S.C. Vancouver Registry No. C991364]. These actions have not yet been set down for trial and do *not*, despite the employer's assertions to the contrary, encompass Hanna's claim for unpaid wages.

Hanna says that he worked, as per the share purchase agreement, in June and July 1998 and was paid, albeit late, at the agreed \$4,000 per month salary. Hanna says that Ebrahim asked him to continue working after July 1998 and he (Hanna) agreed to do so. Hanna's evidence is that he worked regularly throughout August and up to September 4th when he ceased working due to a flare-up of colitis. During August, Hanna oversaw the operations of the shop and did some installation and repair work and well as some sales. Toward the end of August Ebrahim approached Hanna with a proposal to purchase a 25% interest in Canadian Closet but Hanna was not interested. Sometime later, Ebrahim demanded that Hanna "buy back the business", a demand that Hanna rejected. As noted above, the share purchase agreement is now before the courts, Spica claiming that it has not received full payment for the shares and Afcan counterclaiming that it has suffered loss and damage as a result of various defalcations and other breaches by Spica and its principals.

The delegate--in the absence of any submissions from the employer--accepted that Hanna was employed by Canadian Closet in August and early September 1998 and, accordingly, awarded him his regular wages (\$4,000) for August, a pro-rated amount for the 4 days worked in September, concomitant vacation pay and interest.

Ebrahim, on behalf of the employer, says that Hanna was not employed by Canadian Closet during August and September 1998 although Ebrahim does acknowledge that Hanna was on-site "2 to 3 times in August" and that he may have spoken with Hanna by telephone on some other occasions during August. However, Ebrahim strongly asserts that Hanna was no longer employed by Canadian Closet after July 31st, 1998 (which was the last day of the further period of employment provided for in the share purchase agreement).

I cannot accept the employer's position for several reasons:

- Ebrahim says that Hanna was terminated on July 31st but no Record of Employment confirming such termination was ever issued;
- if Hanna was terminated, why was he still--*as documented by the employer's own records* and as corroborated by documents submitted by Canadian Closet customers--dealing with Canadian Closet suppliers and customers during August?
- the employer did not present any evidence from other Canadian Closet employees to corroborate Ebrahim's assertion that Hanna, contrary to Hanna's testimony, did not work in the shop during August.
- Hanna testified that he and Robert Smith installed closet systems in a number of suites in a condominium complex known as "The Spot" on Homer Street in Vancouver during the 1998 labour day weekend, however, the employer neglected to call any evidence to rebut this assertion.

I draw an adverse inference from the employer's failure to challenge these latter two points in Hanna's testimony.

The evidence before me clearly shows that Hanna was employed by Canadian Closet in August and early September but was not paid for his labour. The evidence shows that Hanna was retained as an employee, at a monthly salary of \$4,000, for June and July 1998. This "fixed-term" agreement then continued as an indefinite contract of hiring, on the same terms and conditions, as and from August 1st, 1998 until the employment was abandoned by Hanna in early September.

Thus, the appeal with respect to Hanna's claim must be dismissed and that aspect of the Determination is confirmed.

ROBERT SMITH'S CLAIM

Smith worked for Canadian Closet, carrying out both sales and installation duties, from July 1st to October 30th, 1998; his monthly salary was \$2,750. Smith complained to the Employment Standards Branch that he was not paid his monthly salary for October and, in the absence of contrary evidence from the employer, the delegate awarded Smith his monthly wage plus concomitant vacation pay and interest, a total of \$3,261.10.

Ebrahim, for the employer, says that Smith did not, in fact, work in October, at least not after October 3rd. Ebrahim testified about a problem with a certain customer and that, when confronted with the evidence of what the employer says was a forgery, Smith simply "just left and disappeared"; "he packed his bags and vanished and I never heard from him again". I might add that there is absolutely no credible evidence before me to corroborate the employer's assertion that Smith was involved in some sort of forgery or other fraudulent activity.

Smith, on the other hand, testified that he was actively seeking sales throughout the month of October but due to the employer's rapidly declining fortunes was unable to meet his sales targets although he had some \$6,500 in sales during the month. Smith and Ebrahim had "a major

blowout”, as Smith termed it, on October 30th at which point Smith quit or was fired and shortly thereafter the firm ceased operations.

Smith’s sales calls and other activities on behalf of Canadian Closet for the month of October are corroborated by his daily diary which records various sales contacts etc. during the month. This diary shows customer names and, in many instances, contact telephone numbers. The employer, despite having this evidence in its possession well prior to the appeal hearing, did not call a single customer to rebut the evidence of sales activity set out in the diary. I draw an adverse inference from the employer’s failure to do so. Similarly, not a single former Canadian Closet employee was called to corroborate the employer’s assertion that Smith was not working during October 1998. I also draw an adverse inference from that fact.

In sum, I find that the delegate did not err in awarding Smith unpaid regular wages and vacation pay for October 1998. Accordingly, the employer’s appeal with respect to Smith must also be dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the total amount of **\$8,868.63** together with additional interest, to be calculated by the Director in accordance with section 88 of the *Act*, as and from February 26th, 1999.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal