

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 -

Added Touch Interiors Ltd.
(“ Added Touch ”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: C. L. Roberts

FILE No.: 2000/457

DATE OF HEARING September 25, 2000

DATE OF DECISION: October 6, 2000

APPEARANCES

For The Added Touch Interiors Ltd.	Kim Chung, Kiu do Chung
For the Director	No one appeared
Julia Sim	On her own behalf

DECISION

OVERVIEW

This is an appeal by the Added Touch Interiors Ltd. (“Added Touch”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination issued by the Director of Employment Standards (“the Director”) June 19, 2000. The Director’s delegate found that Added Touch had contravened Sections 21(2) and 63(1) and (4) of the *Act*, and Ordered that it pay Julia A. Sim (“Sim”) \$1,594.86 as compensation for length of service and for unauthorized deductions from her salary.

ISSUES TO BE DECIDED

The issues on appeal are whether the Director’s delegate erred in interpreting the employment agreement, thereby finding that Added Touch owed Sim for sales errors, and whether Sim quit or was dismissed for cause.

FACTS

The facts are difficult to discern from the Determination. However, the material facts outlined in the Determination were supplemented by evidence at the hearing, and I have expanded those for the purpose of this decision.

Sim was employed by Added Touch, a drapery and blind business, as a design consultant from June 14, 1999 to February 2, 2000. She was initially hired for part time work and on July 8, 1999, Added Touch provided her with a document entitled “Employment Agreement between The Added Touch Interiors and Julia Sim”.

The agreement states, in part, as follows:

THIS IS CONFIRMATION OF THE TERMS OF YOUR EMPLOYMENT SALARY:

You will be paid a basic monthly salary of \$1500.00 This will be paid on the fifteen (sic) of the month and the end of the month. You will also be on a commission basis of 11% of sales once your sales have reached \$20000.00 in any given month. Your base salary will be deducted from this amount...

You will be considered as a monthly employee working a 40 hours (sic) per week schedule.

.....

You and I both agreed that your employment will be on a temporary or trial basis for six months. This will give each of us a time to measure compatibility.

Sim quit Added Touch at the end of January 2000.

On December 1, 1999, Sim measured the Guildford Dental Office for blinds. Ms. Chung argued that Sim made an error on the colour of the blinds, and because no profit was made on the sale, Sim was not entitled to commissions. At the hearing, Ms. Chung clarified that her position was that the blinds that Sim ordered should not count as a sale for which she is entitled to a commission under the agreement, because of the error. Sim alleged that the error was Chung's, not hers, and that if it was hers, it was a cost of doing business.

Chung also claimed that Sim made an error in an order for a customer named McNally.

Although both the Dental clinic and the McNally sales were completed, Mr. and Ms. Chung contended that Sim is not entitled to commissions from either of those sales. There was no evidence that there was any error in the McNally sale. I infer from the evidence however, that no profit was made on that order because Sim offered the McNally's a discount.

The delegate determined that, because the contract did not specify that errors in sales would be deducted from the commissions earned, Added Touch was not permitted to deduct the cost of doing business from an employee's wages. She found that both the Dental Clinic and McNally orders were delivered, and, because the contract based the commission on the gross commissions of the sales, Sim was entitled to commissions on those sales.

There is no dispute that on January 31, 2000, Added Touch advised Sim that her hours of work would be reduced from 40 hours per week to 20 hours per week effective immediately, and that her rate of pay would be \$9.00 per hour plus commissions. The delegate says in the Determination that Ms. Chung stated that she did not realize that she should have given Sim notice of the reduction of her hours of work and rate of pay. At the hearing and in the written submissions on appeal, Ms. Chung took the position that Sim was terminated for cause. Ms. Chung stated that although Added Touch had grounds to terminate Sim, Ms. Chung felt sorry for her because she was a single mother and didn't want to terminate her employment completely.

The Director's delegate found that Added Touch substantially changed Sim's employment relationship when it reduced her hours of work and rate of pay. She concluded that Sim terminated her employment because of the changes, and was entitled to compensation for length of service in the amount of one week's pay.

ARGUMENT

Mr. and Mrs. Chung based their appeal on several arguments, which might be summed up as follows:

The delegate erred in finding that 11% commission was to be calculated on the basis of all sales. Even though the employment agreement stated this, the Chungs argued that their practice was to

pay less commission in certain circumstances, such as indicated by the document entitled Basic Blind Discounts for the month of February 2000. The Chungs say that the 11% commission only applied when the employee made the sales with the marked discount, and if the employee gave a greater discount than indicated on the discount rate sheet, the 11% commission was reduced to a lesser amount or nothing at all. The Chungs say that Sim agreed to this as part of the Employment Agreement, and in fact did not dispute the commission calculation on many occasions. Further, as I understand Mr. Chung's argument, the commissions would not be calculated on gross sales, but on profits. As a result, in those instances where Mr. and Ms. Chung contended that Sim made an error, either in measuring blinds or ordering blinds of the wrong colour, those sales were not counted as a sale because Added Touch made no profit.

Added Touch also argued that Sim's performance was less than satisfactory, and on January 31, rather than terminating her employment outright, reduced her hours of work and rate of pay.

EVIDENCE AND ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has not been met.

I will address each issue separately.

As I mentioned to Mr. and Mrs. Chung at the hearing, I am obliged to interpret the contract drafted by Added Touch. It states that the commission to be paid is 11%. It outlines no circumstances in which the commission paid is to be less than 11%. I find no basis for concluding that the delegate erred in interpreting the agreement. Mrs. Chung argued that I was placing too much emphasis on the words of the agreement. Unfortunately, that is all there is. There is no evidence that Sim agreed to be paid less than the contract provided. I accept Mrs. Chung's point that Sim never argued with her commission payments before she quit. However, I cannot find that mere silence constitutes agreement.

Further, the contract does not provide for commissions to be paid on profits. It states that commissions are based on total sales. I find no error in the Determination in this respect.

Section 21 of the *Act* provides that an employer must not directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose, or require an employee to pay any of the employer's business costs except as permitted by the regulations. The delegate advised Ms. Chung in a letter dated May 8, 2000 that "if Sim's commission is based on the gross sales of the product then you can not deduct from her wages for an error that results in no profit. Deducting for an error in the sale of the blind, no matter who made the error is passing the employer's cost of doing business to the employee".

The appeal on this ground is dismissed.

The Chungs say that Sim quit. In fact, Sim did, but only after Mrs. Chung cut her hours of work in half and changed her rate of pay. Mrs. Chung argued on appeal that Sim was incompetent and was terminated for cause. This was never put forward as a basis for reducing Sim's hours of

work during the investigation, and it is not open for Added Touch to argue that now. However, even if that is the position of Added Touch, there is no evidence Sim was warned in writing that her performance was unsatisfactory. Although Ms. Chung states that she had meeting with Ms. Sim in July and September regarding her low sales and careless mistakes, none of those concerns were put into writing.

In *Kreuger* (BC EST #D003/97) the Tribunal held that where an employer is of the opinion that an employee is incompetent, it has an obligation to

- a) establish and communicate a reasonable standard of performance,
- b) give the employee an opportunity to meet the required standards and show that he was unwilling to do so,
- c) notify the employee that he had failed to meet the standards and that his employment was in jeopardy because of that, and
- d) dismiss only when the employee fails or is unwilling to meet those standards.

The burden of proving the conduct of the employee justifies dismissal is on the employer.

There is no evidence these steps were followed in this case. Furthermore, even if Mrs. Chung found Sim to be incompetent as early as September as she alleges, there was no explanation why she kept Sim on after the probationary period was over. The probation period ended January 8, and Sim was kept on the job for several more weeks before her hours were reduced.

Section 66 of the *Act* provides that if a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated. There is no dispute that the decision to reduce Sim's hours in half was a unilateral decision. I agree that it is a substantial and adverse change to Sim's employment conditions.

I am not persuaded that the delegate erred, and dismiss the appeal.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated June 19, 2000, be confirmed, together with whatever interest may have accrued since that date, pursuant to section 88 of the *Act*.

C. L. Roberts

C. L. Roberts
Adjudicator
Employment Standards Tribunal