

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 -

Halston Homes Limited
("Halston")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/451

DATE OF HEARING: November 10, 2000

DATE OF DECISION: December 12, 2000

DECISION

APPEARANCES:

on behalf of Halston Homes Limited

Anita Kushniruk

on behalf of the individual

in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Halston Homes Limited (“Halston”) of a Determination which was issued on June 9, 2000 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Halston had contravened Part 3, Section 18 of the *Act* in respect of the employment of Robin McLachlan (“McLachlan”), and ordered Halston to cease contravening and to comply with the *Act* and to pay an amount of \$1,988.69. The principal amount determined to be owed was the balance of a commission the Director concluded had been earned by McLachlan before his employment with Halston ended.

Halston says the Determination is wrong because the sale on which the commission was based was not completed before McLachlan’s employment with Halston ended.

ISSUE

The issue in this case is whether the conclusion of the Director, that McLachlan had earned commission wages on the sale of a manufactured home before his employment ended, was wrong.

THE FACTS

There is no significant dispute on the relevant facts. The dispute is how the *Act* applies to the facts of this appeal. The Determination notes:

Halston Homes Limited operates a business which is under the jurisdiction of the *Act*. Robin McLachlan worked from March 2, 1999 to September 27, 1999 as a salesperson at the rate of 25% of the net profit for commission as calculated by the employer.

The following additional information was acquired through the material on file or was provided by Anita Kushniruk, the Accountant/Controller for, and a director/officer of, Halston and McLachlan.

1. On July 20, 1999, a Purchase Agreement for a manufactured home was signed by McLachlan, acting on behalf of Halston, and Rudi and Ursula Zechner (“Zechners”). The

agreement contemplated the home would be delivered and set-up on property the Zechners owned near Valemount, B.C. on or about September 1, 1999.

2. The Zechners made an initial deposit on the home, with the balance being payable “upon completion and inspection to customers satisfaction”.
3. Halston paid McLachlan \$1000.00, referred to by Halston as an “advance commission”, on July 23, 1999.
4. The home was delivered and set-up on the property between September 14 and September 16, 1999. Some of the roof parts were missing and, without the parts, the two halves of the home were not properly connected. On or about September 18, 1999, there was a rainstorm and water entered into the home, damaging its interior.
5. The Zechners contacted McLachlan, who assured them the damage would be repaired.
6. At approximately the same time, the Zechners expressed dissatisfaction with the valences that had been installed in the home. That matter was referred back to the manufacturer, who dispatched a crew who, ultimately, changed the valences. There was also some minor warranty work that was required to be done. All of the matters that required attention took some time.
7. On September 24, 1999, the Zechners made a substantial payment toward the purchase price of the home, holding back approximately \$20,000.00 pending completion of the three matters mentioned above.
8. The warranty work and the changing of the valences were completed by early October, while the damage to the interior was not completed until on or about November 16, 1999. The Zechners made the final payment on the purchase price on November 16, 1999.

As of September 27, 1999, McLachlan was no longer employed at Halston. Mrs. Kushniruk, who was employed at Halston as the Accountant/Controller throughout the period covered, described how the three matters raised in this sale were handled by Halston. Mrs. Kushniruk described the damage caused by the apparent combination of the missing roof parts and the rainstorm as an unusual situation. After receiving a call from the Zechners, the situation required Halston to confirm the extent of the damage, which they did through the contractor who had set up the home, investigate respective areas of responsibility between Halston, the contractor and the manufacturer, contact the manufacturer, have some discussion on whose responsibility it might be to repair the damage and arrange for the damage to be repaired. Mrs. Kushniruk indicated that not all matters might be agreed or resolved between the interested parties before the damage was repaired. She described the matter involving the valences as quite unique. As noted in point 5 above, she referred the matter back to the manufacturer, who dispatched a crew to address the Zechners’ concerns. Halston was not involved with that matter after it was referred back to the manufacturer. Warranty repairs are fairly typical. Following the set-up, the purchaser and the set-up contractor do an inspection of the home, which includes identifying any possible warranty claims. Halston receives a copy of the inspection and has some authority to determine whether a problem is a warranty claim, but once it is decided the matter involves a warranty claim, they are looked after by the contractor.

Ownership of a home is in the name of Halston and remains so until the terms of the Purchase Agreement are completed. In this case, ownership of the manufactured home was registered in the Zechners' name on or about November 25, 1999.

During the investigation of the complaint, Halston remitted \$819.81 to Revenue Canada on McLachlan's behalf. Based on material provided to the Director during the investigation, the net profit on the sale was \$14,558.49, and 25% of the net profit was \$3,639.62.

ARGUMENT AND ANALYSIS

The Director concluded:

The entitlement to a commission arises on completion of a sale, not on the arrangement of a sale. The sale is completed by delivery of the property and the payment of the purchase price. All of which was done in this case.

Much was made in the appeal about *when* the sale was completed. In my view, that concern is largely irrelevant. As noted in the appeal:

The major issue here is that the sale was NOT completed when the complainant left our employ. As stated numerous times, it was not just warranty work that was outstanding, there were several issues pertaining to the finishing of the home.

It might be a concern if the issue was *whether* the sale was completed, but there is no dispute that it was completed. The Determination is absolutely correct in its conclusion that as of completion McLachlan was entitled to be paid his commission. On the face of the employment agreement, Halston was required to pay McLachlan 25% of the net profit on the sale.

It makes no difference to that conclusion that McLachlan's employment with Halston was ended before the sale was not completed. In the circumstances, McLachlan was an employee for the purposes of the *Act*. The definition of employee in Section 1 of the *Act* includes:

(a) *a person, including a deceased person, receiving or entitled to wages for work performed for another,*

The relevance, for this case, is that McLachlan continued to be an employee for the purposes of the *Act* so long as he remained entitled to wages for work performed for Halston. In other words, it is not the fact of a continuing employment relationship that determines whether a person is an employee for the purposes of the *Act*, but the entitlement to wages for work. Simply put, once the sale on which McLaughlin worked was completed, McLachlan was entitled to be paid for that work and, for the purposes of the *Act*, was an employee. Halston was required to pay McLachlan for his work. Section 1 of the *Act* defines wages and work:

“wages” includes

(a) *salaries, commissions, or money, paid or payable by an employer to an employee for work,*

(b) *money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,*

(c) *money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,*

(d) *money required to be paid in accordance with a determination or an order of the tribunal, and*

(e) *in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefits, to a fund, insurer or other person,*

but does not include

(f) *gratuities,*

(g) *money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,*

(h) *allowances and expenses, and*

(i) *penalties.*

...

“work” means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

The only question is whether there was any basis for not paying McLachlan his full commission. Halston has taken the position, during the investigation and in this appeal, that, because another person at Halston was involved in aspects of the sale before it was completed, McLachlan was required to split his commission with that person. The Determination contains the following response to that position:

. . . the complainant was employed by the employer to sell homes. The complainant sold a home. The home was delivered and set up. The complainant left the employer's employ. A problem with the roof of the home developed which was covered by warranty. The company Accountant/Controller assessed the warranty work (which she always does, whether relating to this sale or others). The customer withheld final payment until satisfied the home was sound.

While the above response is not framed against the applicable provisions of the *Act*, it captures the essence of the issue in the context of the evidence before me.

While there was work performed by another employee of Halston relating to the water damage, the valences and the warranty repairs, the evidence indicated the following:

1. There were not “several issues pertaining to the finishing of the home” in addition to the warranty matters, there were two “issues”, the water damage and the valences.
2. The Determination concluded that warranty work matters are always assessed by the Accountant/Controller. That conclusion is not seriously challenged by Halston in the appeal and there was, in any event, no evidence that would justify overturning that conclusion.
3. The two “issues”, the water damage and the valences, were described by Mrs. Kushniruk as unusual and unique, respectively, suggesting there was no established practice or procedure concerning how such issues would be addressed, or by whom. Mrs. Kushniruk did not contend in her evidence that McLachlan would have been responsible for performing any or all of the work involved in addressing the “issues”. The matter of the water damage involved some discussion about possible legal liability for the damage. The steps taken by Halston to address those “issues”, and the work involved, is outlined above.
4. In his evidence, McLachlan said, “basically, there was nothing more for me to do” in respect of the sale at the time his employment ended. For its part, Halston did not show this statement was wrong or that addressing all or any part of these “issues” was an aspect of the work McLachlan, or any other salesperson, was required to perform in order to “earn” his total commission. There is certainly nothing in the terms of employment that would suggest such a condition.

On the basis of the above evidence, and an application of the provisions of the *Act* to the facts and material, I do not accept that McLachlan was not entitled to the full commission of 25% of the net profit on the sale of the home, as set out in his employment agreement and can find no error in the Determination. Even if I accepted that McLachlan would have dealt with the “issues” if his employment had not ended, there was, in any event and contrary to the assertion of Halston in the appeal, very little actual work done by any person from Halston on those “issues”. No effort has ever been made by Halston to justify its conclusion that the value of such work was equivalent to roughly ½ of the total commission payable on the sale of the home. In this sense, I am not discounting the possibility that an employee may not be entitled to the full commission contemplated by their terms of employment because all of the work associated with that commission was not completed. In such a case, however, there will be a fairly high burden on an employer to show that performance of that work was essential to an employee receiving the full commission, that all the work essential to receiving the full commission was not done and that the work left undone has been reasonably valued and the commission to which the employee is entitled has been paid.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated June 9, 2000, in the amount of \$1,988.69 be confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson

David B. Stevenson
Adjudicator
Employment Standards Tribunal