Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Abba Carpets Warehouse Ltd.
("Abba" or "employer")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Paul E. Love

FILE No.: 2000/713

DATE OF DECISION: January 24, 2001

DECISION

OVERVIEW

This is an application for reconsideration, made by the employer Abba Carpets Warehouse Ltd. ("Abba") in relation to Tribunal Decision #D388/00 made September 25, 2000. This application was determined on the written submissions of the parties. The employer seeks a fresh consideration of all his arguments because he claims the Adjudicator was biased in that he gave preference to the arguments and evidence of the employee. The only particular of bias alleged in support of the employer's argument was that the Adjudicator found it was permissible to rely on an oral request of the employee to deduct EI payments from her commission, but that it was not permissible to deduct payments on a promissory note signed by the employee. The adjudicator did not err in considering the arguments and evidence, and the particular of bias alleged, did not meet the threshold test for reconsideration.

ISSUE TO BE DECIDED

Is this a proper case for reconsideration of the Decision of the Adjudicator?

FACTS

This is an application for reconsideration of decision D388/00 made by Adjudicator Wolfgang on September 30, 2000. Mr. Wolfgang made three decisions arising from the one complaint of Ms. McLeod, the employee. There have been calculation issues, primarily as a result of the failure of this employer to keep records required by the Employment Standards Act (the "*Act*"). In this application I set out only the facts necessary to understand the procedural history and the nature of this application, and leave the full reading of Decisions 300/99, D133/00 and D388/00 to the diligent reader. This is because a reconsideration application is not a fresh consideration of the merits of a Determination.

Ms. McLeod was an inside commission sales person employed by Abba at its Duncan location. She commenced employment on July 1, 1995. Abba changed Ms. McLeod's job to an outside sales position. Abba did not keep records concerning Ms. McLeod's hours of work, and did not pay minimum wage. Abba claimed to be unaware that a commission sales person must receive minimum wage and that the employer had a duty under the *Act* to keep records. Abba took the position that as a sales associate Ms. McLeod was not an employee. Every month the employer advanced monies to Ms. McLeod against her commissions. Ms. McLeod asked the employer to make deductions from her pay for CPP, EI and Income Tax. Prior to going on a maternity leave the employer presented Ms. McLeod with a promissory note ("note"), in the amount of $6,595.00 which it says represented the difference between what she had been paid and the amount of commissions she generated. Ms. McLeod signed the note and went on maternity leave. While Ms. McLeod was away, commission earnings

were generated from work that she performed prior to the maternity leave. The employer applied these commissions to reduce the amount of the promissory note. The employer claims to rely on an oral permission from Ms. McLeod.

Ms. McLeod returned to work and initially on her return to work the employer paid commissions only, and this was changed in June of 1997 to provide for an advance of $1,600 on the 15th of each month. This arrangement stayed in effect until the business closed in December of 1997. The Delegate issued a Determination on April 21, 1999 in the amount of $10,168.31.

The Delegate did not take the note into account in calculations of wages. This is because the note covered a period of time beyond 2 years back, and the Delegate can only review matters two years before a complaint. The Delegate applied s. 80 of the *Act* with regard to a 24 month limitation. The Delegate also was of the view that the note was obtained fraudulently from the employee, and in any event was in error because the employer failed to take into account the fact that Ms. McLeod was entitled to minimum wage.

The employer filed an appeal of this Determination. The employer argued that Ms. McLeod was not an employee, and was not entitled to the minimum wage. In a decision rendered on September 3, 1999, #D300/99, the Adjudicator found that Ms. McLeod was an employee, and that she was entitled to commissions, and referred the issue back to the Delegate for a determination of the quantum. In that decision the Adjudicator ruled on the issue of whether the amount of a promissory note signed by McLeod should not be taken into account in determining the commissioned earnings of Ms. McLeod. The adjudicator stated as follows:

> Abba raised the point of the promissory note signed by McLeod plus interest owing on the amount of the outstanding balance. It was the position of McLeod the outstanding amount was recovered from commissions that were earned on previous sales and credited to McLeod during her maternity leave. The evidence at the hearing favoured the belief that the outstanding debt was virtually eliminated when McLeod returned to work and they stared out with a "clean slate". Interest had not been discussed and was only brought forward in Abba's submission to the Tribunal.

The Delegate performed another series of calculations which then were disputed by the employer.

This recalculation provided by the Delegate in a letter dated December 31, 1999 awarded Ms. McLeod the sum of $8,181.83 plus interest of $945.78 for a total of $9127.61. Abba's challenge to this calculation rested on the issue of whether the Delegate erred in deducting the promissory note. The issue of whether the amount of the promissory note should be taken into account was fully canvassed by the Adjudicator in the employer's appeal which

resulted in Decision #D133/00. In Decision #D133/00, made on March 31, 2000 the Adjudicator found as follows:

> The delegate was correct in not considering the promissory note as part of the calculation. McLeod had not signed an assignment of wages as required by Section 22(4) of the Act. If there is an obligation for McLeod to pay the promissory note it cannot be deducted from any wages without that written assignment. Further the promissory note covered advances made beyond the 24-month limitation in Section 80 of the Act ...
>
> McLeod admits monies are owed to Abba in respect of he advances she received from August 1995 to June 1996. The total of the advances were reduced by the amount of the commissioned earned by McLeod and the parties are not in agreement of what the proper amount should be. The attempt to mediate was unsuccessful and the relief to the issue of the promissory note must be found outside the Tribunal.

The Adjudicator found calculation errors in the Determination and referred the matter back to the Delegate to be re-calculated, with additional interest. The Delegate then issued recalculations on June 27, 2000 finding Abba owed McLeod the sum of $9,0303 including interest to June 27, 2000. The employer appealed this calculation. On September 25, 2000, the Adjudicator issued decision #D388/00, which confirmed the Delegate's calculation. In this decision the Adjudicator stated as follows:

> 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 the minimum wages during the entire period of Ms. 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 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.

The employer filed this application for reconsideration from decision #D388/00.

Employer's Argument:

The employer alleges bias on the part of the Adjudicator in that the Adjudicator selectively considered some but not all the information provided in reaching the decision. The only particular of bias alleged by the employer is that the Adjudicator indicated that a verbal request from the employee was sufficient to permit an employer to deduct EI deductions, but the same verbal request was not sufficient to permit the employer to deduct from commissions payment of a promissory note. It is suggested that this is a double standard and some evidence of bias.

ANALYSIS

In this reconsideration application, the burden rests with the applicant, in this case the employer, to demonstrate an error which falls within the scope of a reconsideration application. Generally there is a heavy onus on the party seeking reconsideration to demonstrate:

(a) procedural unfairness;

(b) a fundamental error of law or fact;

(c) some compelling new evidence that was not available at the initial appeal

Generally, there is a two stage process in a reconsideration application. The first stage is whether or not the application falls within the scope for reconsideration, and the second stage concerns the merits of the application. The employee in its written submissions resists the application for reconsideration on the basis of both stages of the analysis.

I note that consistent with the decisions of the Tribunal, the power to reconsider under s. 116 of the *Act*, is a power to be used sparingly, when proper grounds are established by the party seeking the reconsideration. It is not a fresh opportunity for me to consider again the merits of the decision. I note that this application appears to be an attempt by the employer to have the entire file considered freshly by a new adjudicator. In a letter to the Tribunal, dated October 10, 2000 the employer noted

> ... To reiterate we feel that the appointed adjudicator acted in a biased manner in favor (sic) of the Plaintiff Ms. McLeod in as much as he chose to use only selected submissions and evidence and not ALL information in arriving at the above decision. Further we feel that the Director has acted in an unfair and biased manner through his statements as to what is and what is not false information as provided by the Defendant(s). We sincerely trust that this request will be granted and a NEW UNBIASED adjudicator will be appointed to carefully consider ALL of the submissions.

I have set out the procedural history of this matter in some detail. The employer maintains that the promissory note should have been taken into account in the calculations by the Delegate.

The new point raised is that the Adjudicator was biased because he did not take into account the note, yet permitted statutory deductions to be taken off commissions owed to the employee. The employer argues that the Adjudicator selectively considered the facts and submissions of the parties.

I note that at the root of this dispute is the employer's failure to maintain proper employment records, pay the employee in accordance with the *Act*, and failure to consider the minimum wage provisions of the *Act*. This posed a significant problem for the Delegate charged with the investigation of the complaint. It is unusual for a complaint to require three sets of calculations by the Delegate.

I find that the employer's allegation of bias does not meet the threshold for a reconsideration of the merits of the decision. The particular example selected by the employer to illustrate bias, is no illustration of bias. The employer alleges that it was bias to find that an oral authorization from an employee was sufficient to authorize a deduction of EI premiums from commissions, but not sufficient to authorize payments under a promissory note. Section 21(1) and (2) of the *Act* state as follows:

> 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 permitted by the regulations.

An EI premium deduction is a payment required by an enactment of Canada, or alternatively, is an employer's business cost. It is clear from s. 21, that as a matter of law, an employer requires no consent and no written assignment from an employee to make a statutory deduction from pay, such as a deduction for EI premiums. An employer is obliged by law to make statutory deductions. The promissory note is a completely different issue. As a matter of law under the *Act*, even if the parties have made an oral agreement with regard to a deduction from pay, an employer may not make a deduction from pay unless there is a written assignment which complies with the *Act*. This is the effect of s. 21 and 22 of the *Act*. A promissory note is evidence of a debt and is not a written assignment within the meaning of s. 22 of the *Act*. The debt in this case extends to cover a period in excess of 24 months before the date of the complaint, and is incorrectly calculated in any event. The Adjudicator dealt correctly with the law in this matter. There is simply no evidence of bias as alleged by the employer.

I note that if the employer has a claim against the employee based on debt or on the promissory note, it is beyond the jurisdiction of an Adjudicator to "set off" the debt or the note against wages owing. The Adjudicator correctly stated in #D133/00, where the Adjudicator noted that "relief to the issue of the promissory note must be found outside the Tribunal". The Tribunal is a statutory tribunal and an Adjudicator has jurisdiction only to consider claims under the *Act*. An Adjudicator has no jurisdiction to set off claims which do not arise under the *Act*, or claims which are not authorized by the *Act*.

Further, the fact that the Delegate or an Adjudicator preferred the evidence of the employee over the employer does not give rise to any inference of bias. The task of a Delegate is to investigate a complaint and to make a Determination based upon information that the Delegate finds credible and reliable. The task of an Adjudicator is to review the submissions and evidence to determine whether the Delegate erred. Unless an appellant can demonstrate a fundamental unfairness in the fact finding process or a significant error in a Decision, a Decision will not be reconsidered.

I therefore find that the employer has not met the threshold test and dismiss the application for reconsideration.

ORDER

Pursuant to section 115 of the *Act*, I order that the Decision in this matter, dated September 25, 2000 be confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal