EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

Cascadia Technologies Ltd.
("Cascadia")

Anthony D. Cohen
("Cohen")

Glenn Coward
("Coward")

William A. Travnik
("Travnik")

Luciano J. Allard
("Allard")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/506

DATE OF HEARING: January 6th, 1997

DATE OF DECISION: January 15th, 1997

DECISION

APPEARANCES

Glenn Coward and
William A. Travnik — on their own behalf and on behalf of Cascadia Technologies Ltd. and Anthony D. Cohen

Luciano J. Allard — on his own behalf

Lesley Christensen for the Director of Employment Standards

OVERVIEW

Two appeals have been filed pursuant to section 112 of the Employment Standards Act (the "Act") with respect to the following Determinations:

Appellant	Determination No.	Issue Date	Amount
Cascadia Technologies Ltd.	CDET 003645	Aug. 13th, 1996	$18,835.17
Anthony D. Cohen	DDET 000375	Aug. 14th, 1996	$ 6,240.00
Glenn Coward	DDET 000376	Aug. 14th, 1996	$ 6,240.00
William A. Travnik	DDET 000377	Aug. 14th, 1996	$ 6,240.00

The first appeal was filed on August 29th, 1996 by counsel for Cascadia Technologies Ltd. ("Cascadia"), Anthony D. Cohen ("Cohen"), Glenn Coward ("Coward") and William A. Travnik ("Travnik"). The second appeal was filed on September 4th, 1996 by Luciano J. Allard ("Allard"), a former Cascadia employee.

The Director held that Cascadia owed Allard certain monies representing unpaid wages (and concomitant vacation pay), unpaid reimbursable business expenses and interest. The Determinations issued against Cohen, Coward and Travnik represent two months' wages and were issued pursuant to section 96(1) of the Act. Under this latter provision, persons who were directors and officers "at the time wages of an employee of the corporation were earned or should have been paid [are] personally liable for up to 2 months' unpaid wages for each employee". It is

conceded that Cohen, Coward and Travnik were officers and/or directors of Cascadia when the events giving rise to the present appeals occurred.

In calculating Allard's unpaid wages, the Director did not take into account a share transfer agreement which called on Cascadia to transfer 300,000 "escrow shares" to Allard under certain terms and conditions. Allard appeals this finding.

FACTS

Cascadia manufactures and markets a processed by-product from craft paper production--Cascadia emulsifies "tall oil" (which I understand is derived from the sap of pine trees) in water. The end product has a variety of uses including stabilizing gravel roads, road dust control, erosion control and pavement sealing; potential customers include state, county and municipal roadworks departments.

Cascadia now concedes (and properly so, in my view) that Allard was hired sometime in October 1994 (the exact date is in dispute) as an employee to assist in the development of a marketing plan for the company's product. In particular, Allard was engaged to formulate and implement a sales strategy for both Canada and the United States. During his tenure with Cascadia, Allard worked out of a Vancouver office. Allard also travelled throughout the United States in an effort to sell the company's product. Allard's employment with Cascadia ended on or about November 20th, 1995.

ISSUES TO BE DECIDED

Following a pre-hearing conference held on December 3rd, 1996, the parties agreed that the evidence at the appeal hearing would concern the following questions:

1. When did Allard commence his employment with Cascadia?;
2. Is Allard entitled to termination pay under section 63 of the Act?; and
3. Was Allard entitled to be reimbursed for all of the business expenses set out in the Determinations?

In addition, at the pre-hearing conference it was also agreed that a further question, namely:

"Did the Director err in refusing to consider, as part of Allard's wage claim, certain Cascadia shares that were to be transferred to Allard in accordance with an escrow agreement?"

would be dealt with by way of written submissions.

I propose to deal with this latter question (which is the basis for Allard's appeal) prior to turning to the issues raised in the appeal filed by Cascadia et al.

ANALYSIS

The Escrow Share Agreement
By way of an agreement dated November 28th, 1994 Cascadia confirmed an employment offer to Allard that included, *inter alia,* "a monthly retainer of $3,000", "a car allowance of $625/month plus fuel", and "300,000 escrowed performance shares subject to the approval of the VSE to transfer these shares to you". Regarding the latter item, the agreement also states that "These shares to be pooled, in accordance with the Voluntary Pooling Agreement entered into by the other directors."

Allard asserts that this latter "escrow share transfer agreement" should have been taken into account by the Director when assessing his unpaid wage claim. There is no evidence before me that the VSE (Vancouver Stock Exchange) ever approved the share transfer; indeed, in his appeal Allard says that Cascadia was negligent in not filing the appropriate documents for review by the VSE.

Whether or not Allard has a contract claim against Cascadia, or as he alleges, a claim in tort for negligence, is not the issue that I must address. My task is more limited, namely, to consider whether or not the share agreement constituted an agreement to pay "wages" as defined in section 1 of the Act.

"Wages" are defined to include, *inter alia*, "salaries, commissions or money paid or payable by an employer to an employee for work" and "money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency". As the escrow shares were never transferred, the shares were not "paid"; thus, Allard must make out his case on the basis that the shares were "payable". In this respect, I note that the agreement was subject to at least one condition precedent, namely, "the approval of the VSE". As noted above, VSE approval was apparently never sought nor obtained.

Cascadia asserts that the transfer was subject to a further "performance" requirement that Allard generate $2 million in sales. It is conceded that Allard did not meet this target as, by his own evidence, Allard's total sales during his tenure with Cascadia were approximately $50,000. There is a reference in the November 28th, 1994 agreement to "a gross sales figure of $2,000,000" but only in regard to the issuance of "a power of attorney for 100,000 warrants at $0.27".

Allard was hired by Cascadia to generate sales. The governing VSE policies state that "performance share agreements" are approved on the basis that the agreement will be serve as a performance incentive for key employees. Thus, on balance, I am satisfied, that the release of any escrow shares was subject to the condition that Allard generate at least $2 million in sales.

Accordingly, I am of the view that the 300,000 escrow shares do not constitute "wages" under the Act as these shares never became "payable" to Allard pursuant to the terms of the November 28th agreement. Therefore, Allard's appeal is dismissed. I wish to make it clear that I am not passing any judgment as to whether or not Allard has a valid claim in contract or tort with respect to Cascadia's alleged failure to make a *bona fide* effort to secure VSE approval regarding the escrow share transfer agreement. I have only determined the narrower question of whether or not the share agreement could be characterized as "wages" under the Act. Indeed, with respect to the escrow share agreement, it may be that Allard has a possible claim under section 8 of the Act, but that issue is not before me.

When did Allard commence his employment with Cascadia?
There is relatively little dispute between the parties with respect to this matter. Cascadia et al. maintains that Allard's employment did not begin until October 21st, 1994 whereas Allard and the Director state that the commencement date was October 17th, 1994. I accept Allard's evidence that his employment began on October 17th. Indeed, there is evidence in the file, in the form of expense receipts, that would suggest that Allard was working on behalf of Cascadia by the end of the first week of October 1994.

Is Allard entitled to termination pay under section 63 of the Act?
Coward and Travnik's evidence at the appeal hearing was that a meeting was held in October or November 1995 at Cascadia's Vancouver office on Pender Street. At this meeting Allard was advised that the company wished to change the method of his compensation ($3,000 per month) to a "straight commission" arrangement whereby Allard would receive a percentage of his sales. According to Coward,

Allard was not prepared to discuss such a change and left the meeting saying "That's it? I'm out of here; I'll see you in court!". Taking this evidence at face value (Allard's evidence regarding this meeting is somewhat different), it is my view that Cascadia constructively dismissed Allard on or about November 20th, 1995.

Section 66 of the Act provides that "If a condition of employment is substantially altered" this may be treated as a termination. In my view, this section applies to the situation at hand inasmuch as Cascadia was asking Allard to switch from a fixed to a variable compensation scheme. In light of the minimal sales generated by Allard, Cascadia knew that such a change would result in a dramatic reduction in Allard's earnings. Indeed, this was the whole point as Cascadia was attempting to cut its costs. I would therefore award Allard two weeks' wages as compensation for length of service pursuant to section 63(2)(a) of the Act.

Was Allard entitled to be reimbursed for all of the business expenses set out in the Determinations?

The expenses in dispute represent, according to the receipts submitted by Allard, fuel, parking, car rental, airfare, meal, hotel, cellular phone charges and other incidental expenses. At the hearing it was agreed that the Determination was in error in that $652.11 of cellular phone charges were double-counted. The cellular phone account is issued in the name of Paula Allard, however, Allard testified that he took over his daughter's service contract and I accept that explanation. I have reviewed the various documents that relate to the claimed expenses and all, in my opinion, can reasonably be characterized as relating to efforts by Allard to generate sales on behalf of Cascadia. It must be recalled that travel was an integral aspect of Allard's duties. That being the case, by reason of section 21(2) of the Act, I am of the opinion that, but for the already-noted adjustment on the phone accounts, Allard is entitled to be reimbursed for those expenses set out in the Determinations.

ORDERS

Pursuant to section 115 of the Act, I order that Determination Nos. DDET 000375 (Cohen), DDET 000376 (Coward) and DDET 000377 (Travnik) be confirmed as issued in the amount of $6,240.

Pursuant to section 115 of the Act, I order that Determination No. CDET 003645 (Cascadia) be varied to include two weeks' wages (*i.e.*, $1,500) as compensation for length of service (together with commensurate vacation pay) and that the total

business expenses relating to cellular phone charges be reduced by the agreed amount of $652.11. The Director is hereby directed to make the appropriate interest adjustments and calculations pursuant to section 88 of the Act and to issue an amended Determination as against Cascadia.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal