

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 -

Netcore Professional Services Ltd.
(“Netcore”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 97/933

DATE OF HEARING: March 3, 1998

DATE OF DECISION: April 7, 1998

DECISION

APPEARANCES

Glen Mueller

President of Netcore Professional Services

OVERVIEW

This appeal is by Netcore Professional Services Ltd. (“Netcore”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) dated December 5, 1997. That Determination awards performance bonuses to Michael Conrad.

ISSUE TO BE DECIDED

The issue is whether or not Conrad is entitled to payment of what is called a “performance bonus”. Netcore says that its performance bonus is on condition of satisfactory work by the employee. That is said to have been made clear to Conrad when the terms of his employment were discussed. And Netcore says that Conrad’s performance was in fact quite unsatisfactory and that as such it is not required to pay any performance bonus moneys.

FACTS

Michael Conrad was offered, and accepted, the position of Senior Network Consultant for Netcore on February 5, 1997. Prior to that he had done work for Netcore as a subcontractor operating as Easy Interface Computer Services. On June 2, 1997, Conrad advised Netcore that it was his intention to resign effective June 16th, 1997.

A letter dated February 5, 1997 sets out terms of Conrad’s employment. It provides for a salary of \$51,000 per year, various benefits, and the payment of bonuses. Three bonuses are listed and described, a 10 % Development Bonus for new customers, a 1 % Project Lead Bonus for work by junior analysts working under Conrad’s direction, and a “3 % *Performance Bonus*” based on billable revenue on existing business you perform”.

The letter of February 5, 1997 does not state whether payment of the performance bonus is automatic or on condition of the attainment of some level of performance. The delegate of the Director who issued the Determination found “there were no conditions attached to the entitlement of (the) bonus” and awarded the bonus to Conrad.

Glenn Mueller, President of Netcore, hired Conrad. He says that the bonus is called a performance bonus because it is dependent on performance. He says that it was made clear to Conrad at the time of his employment that payment would require at least satisfactory work.

Netcore submits that Conrad's work was not at all satisfactory. According to Mueller, it lost three of the clients that it had assigned Conrad and that on investigating matters found that in each case, the client was lost because of incorrect or inadequate work by Conrad.

The Tribunal has heard nothing at all from Conrad.

ANALYSIS

The letter of February 5, 1997 refers to what is called a performance bonus but it is unclear as to whether payment is to be automatic or is dependent on the attainment of some level of performance.

The Determination reflects the conclusion that payment is not on condition of some standard being met. However, as matters are presented to me, which is to say, by Netcore, Conrad not responding to the appeal, the evidence is that the bonus is just what it is called, a performance bonus, and that payment is on condition of satisfactory performance. I must view that as the true nature of the employment contract. There is simply nothing to the contrary.

Having established that payment is dependent on satisfactory work, there is a need to decide whether Conrad's work was or was not satisfactory. Reasonably satisfactory performance would require payment of the bonus. Where payment is not at the discretion of the employer, as it is not in this case if work is satisfactory, and it is related to hours of work, production and efficiency, as it is in this case, the payment is collectible as 'wages' under the *Act* given the definition of wages in the *Act* [section 1 (1) 'wages'].

There is nothing to show that Conrad's work was satisfactory. All evidence of performance is in fact to the contrary. Unable as I am to establish that performance was satisfactory, I am unable see how payment of the performance bonus is in any way required. Accordingly, I am cancelling the Determination.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated December 5, 1997 be cancelled.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal