

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act S.B.C. 1995, C. 38*

- by -

Vancouver On Line Inc.  
(The “Employer”)

- of a Determination issued by -

The Director Of Employment Standards  
(The “Director”)

**ADJUDICATOR:** Richard S. Longpre

**FILE NO.:** 97/26

**DATE OF HEARING:** MARCH 24, 1997

**DATE OF DECISION:** APRIL 8, 1997

**DECISION**

**APEARANCES**

Christopher Chong  
Mark Stevens

For Vancouver On Line Inc.  
on his own behalf

**OVERVIEW**

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) of Determination Letter dated December 18, 1996. The Determination, issued by the Delegate of the Director, found that Mark Stevens had been an employee of the Employer and was owed \$4,590.12 in wages, vacation pay and interest.

Christopher Chong says Stevens was not an employee. He argues that Stevens was a contractor to the Employer. The Employer closed its business in late 1996. Chong acknowledges that Stevens is owed money for his services but that he is trying to first pay wages owing to former employees.

**ISSUE TO BE DECIDED**

The issue is whether Stevens was an employee of the Employer or worked as a contractor throughout the period in question

**FACTS**

Stevens operated a free lance, unincorporated, business for a number of years: MGSmedia. As this company, he commenced working with the Employer. Stevens was engaged to be responsible for areas of the business that Chong did not have expertise to perform. When Stevens began working with the Employer, he maintained the business. He brought his computer to his office. He also brought personal files to the office. After March 15, he retained two clients; neither paid him any fees.

There is no dispute that initially Stevens’ employment relationship with the Employer was that of a contractor. On March 25, 1997 he signed a Letter of Agreement (the “*Agreement*”) with the Employer setting out his future terms of employment with the Employer. Chong argues these terms demonstrate that Stevens remained a contractor. Stevens argues that they demonstrate that after March 15, 1997 he was an employee of the Employer.

Five terms of the Agreement are relevant to this decision. *Duration* reads: “Your position has effectively commenced on March 15, 1996 and will continue till June 15, 1997.” *Renewal* reads: “On or before June 15, 1996, Vancouver On Line Inc. will either decline further relationship or most likely provide an offer for a full position in the company with equity.” *Remuneration* reads: “A sum of \$2500 will be paid on May 1, 1996. A sum of \$2500 will be paid to you on June 15, 1996.” *Expenses* reads: “All expenses related to the performance of your tasks will be covered by the company. Any expenses above \$100 will require prior approval.” *Targets* reads: “Your remuneration and future involvement is determined by the results produced by your efforts in the market. These targets will determine your success.”

Chong agreed with Stevens that he should have the title of “Director of Communications and Marketing” of the Employer. In this capacity, he made decisions for the Employer in this area of its work. He represented the Employer in dealing with its clients. He signed contracts with these clients on the Employer's behalf.

Stevens worked with a great deal flexibility. He did not have set hours of work but he appears to have worked virtually every day. He attended staff meetings. He also performed a variety of managerial and non-managerial tasks unrelated to marketing the Employer's business.

## **ANALYSIS**

The section of the *Act*, relevant to this case, defines an employee as follows:

*"employee" includes*

*(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,*

There is no dispute that Stevens' relationship with the Employer was different from those persons the parties agreed were employees. Chong argued that he never meant Stevens to consider himself an employee of the Employer. That may be so. The terms and conditions of Stevens' employment relationship with the Employer, however, are the deciding factors. As the *Act's* definition states, did the Employer “directly or indirectly” allow Stevens to perform the work of an employee? The test is not whether other employees did similar work to Stevens but rather whether Stevens' terms and conditions of employment were similar to those of other employees.

A determination of Stevens' status as an employee depends on four primary factors: the Employer's control over his work, his integration and economic dependence on the Employer's business, Stevens' ability for profit and loss while working with the Employer and the control he had to manage his own time.

Stevens commenced work as a contractor. The Agreement set out his position with the Employer as of March 15, 1996. It set out the terms of that position. All of the duties carried out by Stevens in his position were integral to the Employer's business. Stevens' marketing was tied directly into the Employer's operation. Stevens represented the Employer in all areas of his work. Stevens was given total responsibility for the marketing of the Employer's business. At all times Stevens represented himself to clients and to other employees as an employee of the Employer.

I accept that Stevens had considerable flexibility in carrying out these duties. This flexibility came from Chong's acknowledged lack of experience in this area of the company's work. The purpose of Stevens' work, however, remained the interests of the Employer. Stevens set his own hours of work. In effect, however, he worked the hours of a regular employee. He also performed duties for the Employer that fell outside his marketing duties. These duties dealt with the management of the Employer. Stevens undertook them with the Employer's knowledge.

Chong relied upon his Agreement with Stevens. He argued that Stevens was on a lump sum payment for a contract that covered a specified period of time. If the Employer was successful Stevens' personal involvement in the business would increase. That did not happen as the business was not successful. Chong also argued that Stevens would receive a profit based on his success in carrying out the work he undertook.

How an employee is paid does not determine employment status. In this case, Stevens was paid for time worked. Stevens' bonus was directly tied to the company's profit. It was from those profits, Stevens was entitled to a bonus. Like all other employees Stevens did not risk a loss. When the Employer's business was not successful the business closed affecting all employees.

The Employer noted the computer equipment Stevens brought to the office. Stevens did this because the Employer did not have a computer for him to use. The Employer noted that Stevens maintained previous clients of MGSmedia. This was negligible work.

Chong noted the disagreements that he had with Stevens. He noted that Stevens occasionally alienated himself from the other employees with the way he treated them. Stevens acknowledged these allegations but said that the purpose of these events was tied directly to what Stevens saw were the needs of the business. Once again, I find these events indicative of Stevens integration in to the Employer's business.

For the reasons set out above I am satisfied that Stevens was an employee of the Employer.

**ORDER**

Pursuant to Section 115 of the *Employment Standards Act* Determination Letter dated December 18, 1996 is confirmed.

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**Richard S. Longpre**  
**Adjudicator**  
**Employment Standards Tribunal**