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-

Project Headstart Marketing Ltd.
("Headstart" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE NO.: 98/63

DATE OF DECISION: April 27th, 1998

DECISION

OVERVIEW

This is an appeal brought by Project Headstart Marketing Ltd. ("Headstart" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by the Director of Employment Standards (the "Director") on January 9th, 1998 under file number 073-418 (the "Determination").

The Director determined that Headstart owed twenty-three former employees a total of $20,242.68 on account of unpaid wages (including compensation for length of service) and interest.

FACTS

Headstart, which formerly carried on business in both Alberta and British Columbia, ceased active operations in late November 1995. Headstart acted in association with a firm known as Aladdin Products Ltd., a company that produced educational materials. In essence, Headstart was Aladdin's "sales arm". Headstart generated sales via telemarketing; Aladdin supplied the materials and invoiced the customers. Aladdin deposited funds directly into Headstart's bank account to meet Headstart's payroll and other operating expenses. I understand that there is on-going litigation between the two firms; on December 13th, 1995 Headstart filed a Statement of Claim against Aladdin in the Alberta Court of Queen's Bench alleging breach of a a "joint-venture" agreement.

The Determination deals with two broad categories of Headstart employees--"Home Surveyors" and another category described as "Managers, Orchestrators and Others". As I understand the situation, the "surveyors" generated sales leads (using an educational "survey" ruse) that, in turn, were followed up by the "Orchestrators".

ISSUE TO BE DECIDED

The employer's appeal, more particularly set out in a letter addressed to the Tribunal dated January 30th, 1998 and appended to its appeal form, concerns whether or not the so-called "Home Surveyors" were Headstart employees or independent contractors. The Director's delegate, applying the two common law tests generally known as the "four-factor" and the "organization/integration" tests, determined that the Home Surveyors were employees under the *Act;* the employer takes issue with this finding.

ANALYSIS

At the outset, I should note that I am in complete agreement with the delegate's analysis of the issue in terms of the two common law tests. Had I been called upon to address the status of the home surveyors under the common law, I would have arrived at the very same conclusion for the very same reasons set out in the Determination

However, I need not even concern myself with the question of the status of the individuals in question under the common law in the face of the statutory definitions contained in section 1 of the *Act.* The *Act* casts a somewhat wider net than does the common law in terms of defining an "employee". Of particular interest are the definitions of "employee", "employer", "wages" and "work" that are set out below:

> "employee" includes
>
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
>
> (c) a person being trained by an employer for the employer's business,
>
> (d) a person on leave from an employer, and
>
> (e) a person who has a right of recall;
>
> "employer" includes a person
>
> (a) who has or had control or direction of an employee, or
>
> (b) who is or was responsible, directly or indirectly, for the employment of an employee;
>
> "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 benefit, 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 or expenses, and

(i) penalties;

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

Clearly, the "home surveyors" performed services on behalf of Headstart, namely, the telephone solicitation of potential customers. As is noted above, "work" need not be undertaken at the employer's residence and thus the fact that these individuals worked out of their own homes is immaterial. "Wages" were paid to the home surveyors in the form of a commission or "piecework" formula which was directly (and exclusively) related to the individual's "production" of qualified sales leads. Headstart alone hired the home surveyors and exercised a reasonable degree of control over the home surveyors by means of, *inter alia:*

- requiring the surveyors to use "standardized" scripts when speaking with potential customers;
- requiring them to be available during certain hours to report to a Headstart manager;
- mandating the work schedule for the surveyors; and
- setting limitations as to who might be a "qualified" sales lead.

There is nothing particularly unusual about the present case. The complainants were hired to be telephone solicitors for Headstart and its associated firm, Aladdin Products Ltd., and performed the sort of marketing services on behalf of those two firms that are often undertaken by employees of firms who use direct marketing methods. Indeed, the evidence before me discloses that prior to October 1st, 1995, the employer itself treated the home surveyors as ordinary employees. In essence, what I have before me is an all too typical attempt by an employer to artificially reconfigure its relationship with it employees so that it appears as though they are independent

contractors. By so doing, an employer may seek to avoid certain statutory obligations and other liabilities, such as the liability imposed on the employer in this case under the *Act.*

As a final point, I might add, since this issue was raised by the employer, that any decision that Revenue Canada might have made with respect to a home surveyor (not one of the present complainants) under the federal *Income Tax Act* has no bearing whatever on the present complainants' status under the B.C. *Employment Standards Act.* Nor am I persuaded that any decision that Alberta employment standards officials might have made with respect to telephone solicitors working in Alberta has any precedential value in the case now before me.

ORDER

Pursuant to section 115 of the *Act,* I order that Determination be confirmed as issued in the amount of **$20,242.68** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal