

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-

Pacific Magazine Publishing Ltd.

(“Pacific Magazine” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/68

DATE OF DECISION: April 29th, 1998

DECISION

OVERVIEW

This is an appeal brought by Michael Graham Parker on behalf of Pacific Magazine Publishing Ltd. (“Pacific Magazine” 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 13th, 1998 under file number 83-689 (the “Determination”).

The Director determined that Pacific Magazine owed its former employee, Jason Bleuler (“Bleuler”), the sum of \$15,999.02 on account of unpaid commissions, compensation for length of service, vacation pay on the latter two claims, and interest.

Bleuler filed a complaint with Employment Standards Branch alleging that he was owed sales commissions for the period July to December 1997 and that he had been constructively dismissed (see section 66 of the *Act*) in approximately mid-July 1997 when the employer, unilaterally and without proper notice, implemented a new commission structure. Bleuler alleged that because the new commission structure would adversely affect his earnings he resigned.

ISSUES TO BE DECIDED

The employer’s appeal is, in essence, based on two grounds:

First, Pacific Magazine says that Bleuler was an independent contractor rather than an employee and, thus, was not entitled to file a complaint under the *Act*;

Second, the employer challenges the Director’s delegate’s finding as to the amount of Bleuler’s unpaid commissions.

The Director’s delegate submits that the appeal should be dismissed outright on the basis of the Tribunal’s decision in *Kaiser Stables Ltd.*, E.S.T. Decision No. D058/97.

FACTS AND ANALYSIS

Bleuler was employed for over three years as an advertising sales representative--styled as an “account executive”--selling advertising for a magazine known as “Vancouver Lifestyles Magazine”. *Based on the information provided by the employer*, the company unilaterally changed the commission structure under which Bleuler operated, on or about June 19th, 1997. In my view, this unilateral and adverse change (vis-à-vis Bleuler’s earnings capacity) clearly constituted a fundamental and substantial alteration in Bleuler’s terms and conditions of employment and thus, I cannot conclude that the Director erred in so finding.

The employer has made some vague allegations of cause but I give such allegations no weight in light of the fact that the employer did not purport to terminate Bleuler for cause.

Accordingly, in my view, the award of compensation for length of service was entirely appropriate.

As for the issue of Bleuler's employment status, I am entirely satisfied that he meets the statutory definition of "employee" set out in section 1 of the *Act*. The employer exercised a sufficient degree of control over his activities and otherwise provided the tools and equipment (office, stationary, telephone, fax, business cards etc.) necessary for Bleuler to undertake his sales duties on the employer's behalf. Bleuler undertook the sort of duties that one would expect any employed commission sales representative to undertake on behalf of his or her employer and he was in a position of economic dependence on Pacific Magazine.

Examples of the requisite control exercised by the employer over Bleuler include the holding out of Bleuler to firm customers as an "employee"; internally, Bleuler was referred to as a member of the firm's "sales staff"; Pacific Magazine retained final say on advertising contract approval and pricing; the employer provided sales leads and mandated Bleuler's attendance at company functions and meetings. In a letter dated July 25th, 1997 the employer purports to acknowledge Bleuler's "verbal resignation on July 17th, 1997"--if, as alleged by the employer, Bleuler was a mere independent contractor, how could he "resign" his employment?

I understand the parties may have attempted to treat Bleuler as an independent contractor for purposes of federal taxation and related statutes. I make no particular finding as the legitimacy of such action although Bleuler certainly appears to me to also be an employee for purposes of the federal *Income Tax Act*. I would note, however, that my jurisdiction arises under the *Employment Standards Act* and having considered the interrelated definitions of "employee", "employer", "wages" and "work", I cannot conclude that Bleuler was an independent contractor.

Finally, I note that the employer has put Bleuler's commission entitlements in issue. Bleuler himself now acknowledges, in a memorandum to the Tribunal received on February 26th, 1998, that his unpaid commissions total \$8,16810 rather than the \$11,361.11 set out in the Determination:

"I reviewed PMP's submission and recalculated my sales and commissions based on all the information and records now available...I calculated a sales total of \$53,045.00 and total commissions owing of \$8,168.10".

Bearing in mind section 2(b) and (d) of the *Act*, in my view, the Determination must be varied so that Bleuler is not overcompensated with respect to his claim for unpaid commissions.

Bleuler also says that, in addition to his unpaid commissions, he is also owed "about \$5,000" in bonuses, however, Bleuler also concedes that he "lack[s] sufficient information and records to claim them". Inasmuch as the Director's delegate did not find that any bonuses were owing and given that Bleuler did not appeal the Determination, I am not prepared to award Bleuler any compensation based on an unsubstantiated claim for bonuses.

I reject the employer's submission that Bleuler's unpaid commissions only total \$4,024 on the basis of *Kaiser Stables, supra.* and the particulars set out at the top of page 2 of the Determination. It must be remembered that the Tribunal is an *appeal* body, and does not conduct a trial *de novo* or entirely new hearing. In cases such as this, where the employer has resolutely failed to cooperate or even participate in the investigation of a complaint, it cannot then expect to come before the Tribunal and, for the first time, present evidence and argument that, more properly, should have been presented to the Director's delegate during the course of the investigation of the precipitating complaint. This is the policy behind the *Kaiser Stables* decision and it is a policy I endorse. Based on my review of the file material before me, I cannot accept the employer's assertion that it was not aware of the delegate's ongoing investigation; if, in fact, it was "unaware" it was only due to its own willful blindness.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied as follows:

i) Compensation for length of service	\$3,579.47
ii) Unpaid Commissions	\$8, 168.10
iii) Vacation Pay	<u>\$ 469.90</u>
 TOTAL	 <u>\$12,217.47</u>

In addition, Bleuler is entitled to interest which is to be calculated by the Director in accordance with section 88 of the *Act*.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal