

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 -

On-Line Film Services Inc.
("On-Line")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/091

DATE OF HEARING: May 26, 1997 and June 16, 1997

DATE OF DECISION: July 21, 1997

DECISION

APPEARANCES

Aerock Fox
Susan J. Fox
Terry Roycroft
Bret Dougherty for On-Line Film Services Inc.

Rick T. Trus on his own behalf

OVERVIEW

This is an appeal by On-Line Film Services Inc. (“On-Line”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination which was issued by a delegate of the Director of Employment Standards (the “Director”) on January 20, 1997. The Determination found that Rick T. Trus (“Trus”) was an employee of On-Line and that he was entitled to receive commissions, overtime wages and annual vacation pay totaling \$4,066.06 (including interest).

On-Line’s appeal argues that Trus was an independent contractor rather than an employee, that he never worked overtime hours and that there was a verbal agreement under which Trus would be paid a commission on sales (with a minimum monthly guarantee).

A hearing was held at the Tribunal offices on May 26, 1997 and June 16, 1997 at which time oral evidence was given and arguments were made.

ISSUES TO BE DECIDED

There are three issues to be decided in this appeal:

- Was Trus an employee of On-Line or a contractor?
- If he was an employee, what was his wage rate?
- If he was an employee, is he owed overtime wages?

FACTUAL BACKGROUND

In the Determination, the Director's delegate describes the complaint made by Trus and summarizes the results of her investigation prior to concluding that Trus was an employee of On-Line. She also concluded that "... the Employer attempted to change the pay structure from \$1,250.00 bi-weekly to \$1,250.00 monthly, or \$7.50 per hour" and that "... there was a discussion and an understanding by the complainant that his wage would be \$10.00 per hour, not \$7.50 per hour as claimed by the Employer."

The calculation schedule attached to the Determination shows that the Director's delegate calculated the wage amounts owing to Trus based on a wage rate of \$10.00 per hour.

The following facts are not in dispute:

- Trus was enrolled as a student at Northwest Film and Video Training Center from November 21, 1995 to March 15, 1996.
- As a student, he was assigned to participate in a *practicum* at On-Line from February 19, 1996 to March 15, 1996 and was required to be there from 8:30 a.m. to 6:00 p.m. each day (Monday-Friday).
- Trus received four payments from On-Line, as follows:

March 29, 1996	\$1,250.00
April 15, 1996	\$1,250.00
May 6, 1996	\$1,250.00
June 28, 1996	<u>\$ 675.00</u>
TOTAL	\$4,375.00
- Trus did not receive a statement of earnings and no deductions were taken from the four payments which On-Line made to Trus.
- On-Line did not record any hours of work during the period of time in question.
- In early March, 1996 (close to the end of Trus's *practicum*), Aerock Fox and Trus discussed what opportunities existed for him in the sales and customer service aspects of On-Line's business.
- On-Line was a new provider of information services to the entertainment industry, including the production of an internet web site and the development of computer software. As such, it was a "start-up" company in early 1996.

All other relevant facts are in dispute, which will become evident from my summary of the evidence and my analysis of it.

EVIDENCE

Aerock Fox testified that as a result of a discussion with Trus in early March, 1996 he decided that Trus would be able to support both sales and customer service responsibilities for On-Line. He also testified that "... there was no discussion about hourly rates" at that time. Rather, the discussion concluded with an understanding that Trus would draft an agreement for their signatures. The draft agreement which Trus prepared was not signed. It included the following terms:

1. Rick Trus is employed by On-Line Film Services as an independent contractor to perform sales, customer service, and special projects as assigned by On-Line Film Services.
2. Sales shall include present and future products and services of On-Line Film Services. Commissions are based on sales and will be calculated on a monthly basis based on total sales for signed agreements, not including PST or GST.
3. Pricing of services and products is based on the rate sheet attached, however, special custom pricing may be given by Rick Trus with approval from On-Line Film Services Management.
4. Rick Trus shall be paid for his services on a base salary rate and commission structure. The base salary rate being \$1250 per month and a draw against sales of \$1250 per month. Paid respectively on the 15th and 30th of the month.
5. This agreement may be terminated by either party with two weeks written notice or pay in lieu of notice.

I (we) agree to the conditions set forth in this agreement dated _____. This agreement is full and complete and may be amended by both parties at any time.

According to Mr. Fox's oral evidence, he did not sign the draft agreement because the fourth term (salary + commission structure) did not accurately reflect his earlier discussion with Trus. Fox testified that he had agreed that Trus would be paid on a "100% commission structure as an independent contractor."

When On-Line submitted its appeal to the Tribunal on February 11, 1997 Mr. Fox gave the following written statement:

Mr. Trus expressed to me prior to March 15, 1996 that he would like to make \$10/hour because that was what he was making doing telephone soliciting. I indicated to him that we were unable to offer him a position at that rate. He agreed to a minimum guarantee of \$1250/month plus a

commission on his sales. Mr. Trus initiated and drew up this agreement on his computer shortly thereafter.

When requested to reply to the documents disclosed by the Director, Mr. Fox's written submission included the following statement on April 24, 1997:

We wanted a person who would look after our customers with respect to Internet Service and Rick seemed like the right person to create a new position in our company. Rick, however, said that he wanted to sell so he could have the potential of making more money - more reward for the time and energy. Rick wanted a minimum guarantee of \$10.00 per hour, the same rate he was getting at a telemarketing job. (It is our understanding that Rick also worked for this telemarketing company while working with On-Line.) I said that I could not guarantee that amount, but if he was successful in sales I believed he would make more. The entry level position with our company is at minimum wage and the original position was an entry level position. We created a special position for Rick offering a good opportunity for success. We were very disappointed in Rick's results and on frequent occasions Susan Fox (Manager of Sales and Marketing) spent valuable hours attempting to train and assist Rick. Susan Fox had numerous discussions about Rick's ineffectiveness with sales and his inside work was unsatisfactory as well.

Rick chose to take the risk against a minimum draw against sales. This was very clear to me and Susan Fox.

Susan Fox gave evidence that Trus was "... left alone for approximately one month" after he finished his *practicum*. She described how she was concerned about Trus's "lack of results" in generating sales and how she met for approximately 1/2 hour each week to discuss his "level of sales and lack of success." Mrs. Fox also testified that Trus never expressed any discontent about his work nor complained to her about his compensation or hours of work.

Under questioning by Trus, Mrs. Fox acknowledged that Trus had staffed On-Line's booth at CINE-EXPO, a 3-day trade show which was held on the weekend of May 2-4, 1996. When asked if she asked Trus to attend, she replied that "it was an opportunity to increase sales." When asked why Trus had not been paid commissions, Mrs. Fox stated that she made several unsuccessful attempts to determine the amount of commissions owing. (Mr. Fox confirmed that no commissions were paid to Trus.)

Under further questioning by Trus, Mrs. Fox testified that her approval of sales documents was not mandatory prior to Trus sending them to potential customers.

Rather, she testified, she would recommend corrections to make Trus's sales efforts more likely to be successful. She also agreed that Trus was required to personally perform sales tasks and that On-Line owned the server (computer hardware) by which customers would gain access to On-Line's internet web site.

Trus testified that when he met with Mr. Fox, at the end of his *practicum*, he told him that "... the minimum I would accept would be \$10.00 per hour". Trus testified that he asked Fox for a prompt reply for two reasons: he was required to provide the information to Human Resources Development Canada (the sponsor of the *practicum*); and he had two other employment opportunities (\$11.00/hour as a telemarketer and \$10.00/hour at Star Film). Trus also testified that he met again with Mr. Fox on the following Monday at which time he was offered a position in sales and customer service at \$10.00 / hour plus a commission on any sales he secured for On-Line.

Trus testified that he met with Fox on May 31, 1996 to request the payments he expected and did not receive on May 15th and May 31st. According to Trus, it was during the meeting on May 31st, rather than during a meeting in early March, that Fox offered to pay Trus \$1,250.00/month as a contractor and asked him to prepare a draft agreement containing those terms. Trus also testified that he prepared the draft agreement "under duress" and did so only so that he would get paid.

Trus argued that the third paragraph of the draft agreement supports a finding that he had no ability to establish the price of products or services which he provided to customers.

Trus was given a pager by On-Line with the expectation that he would respond and assist customers as necessary.

On one occasion, Trus presented a seminar from 7:00 p.m. to 9:00 p.m. on Commercial Drive in Vancouver and testified that he used On-Line's computer equipment (PERFORMA) to demonstrate the services available to On-Line's customers. According to Trus, such seminars were approved by Susan Fox and were usually held at On-Line's offices.

When questioned by Terry Roycroft about his evidence, Trus confirmed his testimony that Mr. Fox had offered him employment at \$10.00/hr "... and a commission would be paid for any sales that I brought in to the company." He also explained that he never received a statement of earnings, "despite asking for one several times."

ANALYSIS

Was Trus an employee?

Section 1 of the *Act* contains the following definitions of employee and employer:

“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. (emphasis added)*

In *Fenton v. Forensic Psychiatric Services Commission* [(1991) 56 B.C.L.R. (2d) 170], the B.C. Court of Appeal noted, at p.185, that the definitions of “employer” and “employee” should be given a liberal interpretation:

First it should be noted that the definitions in the statute of “employee” and “employer” use the word “includes” rather than “means”. The word “includes” connotes a definition which is not exhaustive. Its use indicates that the legislature cast a wide net to cover a variety of circumstances.

In *Castlegar Taxi (1988) Ltd.* [(1991) 58 B.C.C.R. (2d) 341], the B.C. Supreme Court noted, at page 344, that “...the proper characterization of a labour-based relationship is often not a straightforward exercise”. The Court also noted, at p.345, that:

The issue of whether a relationship is one of a contract of service (i.e., employment) or a contract for services (i.e., independent contractor) has

traditionally turned on the degree of control that the party for whom the work is being done has over the activities of the party conducting the actual work. The courts have weighed four factors in assessing the nature and degree of control inherent in the relationship: the master's power of selection of the servant, the payment of wages, control over the method of work, and the master's right of suspension or dismissal.

When I review all of the facts and submissions, I am forced to the conclusion that Trus was an employee of On-Line. I come to this conclusion regardless of which legal test I apply. Both the "four-factor test" [*Walden v. Danger Bay Productions Ltd.* (1994) 90 B.C.L.R. (2d) 180] and the more recent "integration test" (also known as the "organization test" or the "economic dependency test") lead me to conclude that Trus was an employee. The evidence leads me to conclude that On-Line had control over the work performed by Trus, particularly with respect to his "customer service" responsibility. I also find that the level of involvement and control which Mrs. Fox exercised with respect to Trus's "sales" responsibilities was more like that typically seen in an employment relationship compared to circumstances where a contract for services exists. I conclude from the evidence that Mr. Trus and Mr. Fox did not agree on the nature of the relationship which they had formed. On-Line owned the computer hardware and software which Trus operated to demonstrate the internet services which were offered to potential customers. Trus was required to perform the customer service and sales responsibilities himself. There is no evidence to suggest that On-Line considered that the work would be performed by any person other than Trus.

What was Trus's wage rate?

The credibility of the evidence given by Mr. Fox and Mr. Trus is a central issue in this appeal. A number of factors must be considered in assessing credibility: demeanor of the witness; opportunities for knowledge; powers of observation; judgment and memory; ability to describe clearly what has been seen and heard; and the probability of the event happening in the manner suggested *Farnya v. Chorny* [(1952)2 DLR 354 B.C.C.A.]:

"The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions..." (my emphasis)

On balance, I find it improbable that there was an agreement (verbal or otherwise) in early March, 1996 by which Trus would be paid on a "100% commission structure."

There is no dispute in the evidence that Trus's responsibilities included both customer service and sales. However, there is nothing in Mr. Fox's written submissions or his oral evidence which explains how commissions would be calculated and paid to Trus for his customer service responsibilities. I also note the inconsistencies between Mr. Fox's oral evidence on this point and his written submissions of February 11, 1997 and April 26, 1997.

The three payments of \$1,250.00 each, which were made by On-Line on March 29th, April 15th, and May 6th, do not support a finding that Trus was to be paid "a minimum guarantee of \$1250.00/month plus a commission on his sales." Clearly, no commissions were paid, yet Trus received \$2,500.00 during his first month of employment (March 18, 1996 to April 15, 1996).

The payment of \$1,250.00 on May 6th (which Trus expected to receive on April 30th, but received one week later) also supports a finding that Mr. Fox did not intend to pay Trus \$1,250.00/month, plus commission.

When I consider all the evidence and submissions I find that there is no evidentiary basis on which to conclude that the Director's delegate was unreasonable in respect of her findings concerning Trus's wage rate. Thus, there are no grounds to vary the Determination insofar as Trus's wage rate is concerned.

Is Trus owed overtime wages?

The requirement to pay overtime wages is set out in Section 35(a) of the *Act*, as follows:

35. An employer must pay overtime wages in accordance with section 40 or 41 if the employer requires or, directly or indirectly, allows an employee to work

(a) over 8 hours a day or 40 hours a week, or

(b) if the employee is on a flexible work schedule adopted under section 37 or 38, an average over the employee's shift cycle of over 8 hours a day or 40 hours a week.

It is significant that overtime wages become payable under this section of the *Act* in those circumstances where an employer allows, directly or indirectly, an employee to work more than 8 hours a day or 40 hours a week.

On-Line did not maintain any record of the hours which Trus worked. Trus maintained a "time log" of the hours which he worked while employed by On-Line and submitted it, along with his complaint, to the Employment Standards Branch. The Director's delegate relied, in part, on this "time log" to calculate the total amount of wages owing to Trus (as set out in the schedule which was attached to the Determination). Documents disclosed by

the Director's delegate during this appeal process indicate that she was satisfied that the "time log" represented a reasonable record of the hours worked by Trus. Mr. Fox asserted that Trus never worked overtime hours and that his hours of work were "irregular and inconsistent." However, I am satisfied from the evidence which I heard at the hearing that Trus did work on several evenings and at least one weekend (May 4-5, 1996). In addition, On-Line did not adduce any evidence which would allow me to conclude that Trus's regular or normal hours of work were anything other than 8:30 a.m. to 6:00 p.m. daily (Monday-Friday).

For all these reasons, I find that there are no grounds upon which I ought to vary or cancel the Determination.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal