

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 -

Vitality Products Inc.
("Vitality")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Mark Thompson
FILE NO.:	98/206
DATE OF HEARING:	June 15, 1998
DATE OF DECISION:	July 29, 1998

DECISION

APPEARANCES

Ms. Susan Grant on behalf of Vitality Products Inc.

Ms. Susan Campbell on her own behalf

OVERVIEW

This is an appeal by Vitality Products Inc. ("Vitality") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against a Determination issued by a Delegate of the Director of Employment Standards (the "Director") on March 11, 1998. Ms. Susan Campbell ("Campbell") filed a complaint against Vitality alleging that it failed to pay wages for work performed between May 15, 1995 and August 16, 1996. The Determination concluded that Vitality had failed to pay Campbell \$1,716 under their contract. Vitality appealed the Determination on the grounds that Campbell had not been an employee of Vitality and that any money not paid to Campbell would have been paid on a commission basis. The appeal also alleged factual errors in the Determination.

ISSUES TO BE DECIDED

The first issue to be decided in this case is whether Campbell was an employee of Vitality. If she was an employee, then the second issue to be decided is the amount of her unpaid wages, if any.

FACTS

Campbell commenced her association with Vitality on May 15, 1995. She and Mr. William Grant, President of Vitality, signed an agreement effective that date through October 15, 1995. The agreement referred to Campbell's "acceptance as a 'consulting associate' to the Company." It stated that Vitality was undergoing a period of reorganization until August 31, 1995. In the meantime, Campbell was to perform tasks related to the sales and marketing of Vitality products, the administration of Vitality business activities, together with activities performed by Consolidated Firstfund Capital Corp. and public relations of Vitality, its products and its shareholders. The paragraph covering compensation stated:

Compensation will be \$2,000 per month, all inclusive, to be paid \$1,500 cash and \$500 to be deferred and payable in cash or stock in the Company by no later than December 31, 1995.

Campbell testified that she worked regular hours for Vitality in its office. Her responsibilities included investor relations, setting up a data base, contacting shareholders by telephone or fax and promoting the company to business contacts. She shared the office with an administrative assistant who Campbell believed worked for another company in which Mr. Grant had an interest. She believed that she was the only Vitality employee except for another individual who worked under his own contract. Campbell answered the telephone when the administrative assistant was absent. She attended Vitality's annual general meeting and took meetings. Campbell attended other meetings concerning Vitality's business plan, meetings with shareholders and management meetings. She took minutes of these meetings. Campbell prepared weekly reports of accounts receivable and sales report. Campbell testified that her duties took her out of the office infrequently, two or three occasions that she could recall. Vitality did not withhold income tax, unemployment insurance or other taxes from her pay cheque. Grant said that Campbell often worked irregular hours.

Campbell presented biweekly invoices to Vitality, beginning May 31, 1995 through December 31, 1995, each in the amount of \$750, payable to Susan Campbell. The invoices stated that they represented "consulting services to Vitality Products Inc.", followed by details of her work for the pay period. The duties stated in the invoice were consistent with her testimony before the Tribunal, i.e., general clerical and administrative duties. Campbell acknowledged that Vitality had paid the amounts on the biweekly invoices.

On November 3, 1995, Campbell presented a proposal to Mr. Grant for her acceptance of a position with Vitality and Consolidated Firstfund Capital Corp. The proposal outlined the duties she would perform for the two firms and included a monthly salary of \$2,500, noted as "increase of \$500/month for additional related duties with Consolidated Firstfund Capital." It also referred to a "Deferred portion (\$500 per month for a period of six months [from May 15 – November 15, 1995] to be paid in cash by November 30, 1995." Campbell testified that Mr. Grant needed her services for Consolidated Firstfund Capital for two to three days per week for two to three months. However, he did not sign Campbell's proposal. Campbell testified that her duties did not change, as reflected in the invoices she submitted from November 15 through December 31, 1995.

On December 15, 1995, Campbell submitted an invoice for \$3,750, noted as "7.5 months @ \$500 per month" to Vitality. There was a notation at the bottom of the invoice in Grant's handwriting, "WNG extended contract to Dec 31/95."

When she did not receive any payment in response to her December 15 invoice, Campbell wrote to Mr. Grant and Mr. Iain Ball on January 4, 1996. The letter reminded them of the December 15 invoice and requested payment of the amount of \$3,750.00 immediately. The letter further stated:

I do not agree that payment of this invoice should be dependent upon the success and number of licenses sold, nor do I wish to accept deferred stock at this time.

Vitality did not pay the amount in the December 15 invoice, and Mr. Grant did not respond to Campbell's January 4 letter on January 9, 1996. On that date Mr. Grant wrote to Campbell as follows:

Thank you for the consulting services provided to the company for the period May 15, 1995 to December 31, 1995.

A portion of your services were (sic) deferred based on the implementation of the licensing system. You will be compensated \$3,750 during 1996 as licensees come on board, the first of which occurred today.

I am pleased to enclose a cheque for \$1,250.00. An additional \$1,250 will be paid on each of the next two closings.

Grant testified that after January 9, 1996, no more licenses were sold.

Also on January 9, 1996, Mr. Grant wrote to Mr. Iain G. Ball at Consolidated Firstfund Capital Corp., to confirm that Campbell was appointed as "Executive Assistant" responsible to himself for secretarial and administrative duties for Consolidated Firstfund Capital and other companies, investor relations for Vitality and Consolidated Firstfund Capital and responsibilities to implement "company development programs"

The letter also stated:

The appointment is effective January 1, 1996. Her compensation is \$2,500 per month. She is covered for medical and dental under her ex-husband's plan, therefore no deductions are necessary other than income taxes.

Grant stated that Consolidated Firstfund performed various support services for Vitality and other companies in which Mr. Grant had an interest.

Campbell worked for Consolidated Firstfund until August of 1996. She sent a memorandum to Mr. Grant on July 5 asking to discuss her position with Vitality, "remuneration, job description, payment for 1995 (deferred income)." On July 31, 1996, she gave two weeks' written notice of her resignation from Consolidated Firstfund and Vitality. The letter also stated:

Thank you for the payment of \$500 towards the deferred salary. Please make the additional \$2,000 payment by the end of my employment.

Campbell acknowledged that she had been paid according to the January 9 letter from January 1, 1996 until her resignation. During that period, she was treated as an employee, and appropriate deductions were made from her salary. Consolidated Firstfund Capital issued a T4 slip covering Campbell's employment.

Campbell stated to the Director's Delegate that she was on vacation from July 22-26, 1996 inclusive, and she received her normal salary during that time, resulting in an extra payment of \$284.00.

Campbell acknowledged that she discussed deducting expenses from the funds she received from Vitality during 1995 with Grant.

Campbell filed a complaint with the Employment Standards Branch on August 24, 1996, listing Vitality Products as her employer, claiming \$2,000 in deferred salary from May 15, 1995 through December 31, 1995. For reasons not revealed in the evidence before the Tribunal, the Employment Standards Branch did not act on the complaint immediately. A meeting with Mr. Grant and Campbell with a delegate of the Director occurred in May 1997. Campbell raised the matter with a delegate of the Director in January 1998, after which the delegate wrote to Vitality outlining the facts of the case and requesting payment of \$1,716.00. When Vitality declined to make the payment, the delegate issued the Determination.

ANALYSIS

The central argument in Vitality's appeal was Campbell's status as an employee. The Act contains several definitions that bear on employee status. The definition of an "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,

The definition of an "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. . . .

In addition, the common law has developed a number of tests to be applied in deciding whether an individual is an employee or an independent contractor. These include: the degree of control exercised over the worker by the alleged employer, the worker's integration with the alleged employer's operation; the worker's degree of economic

dependence on the alleged employer; the worker's ability to experience profit or loss in relation to the work performed; and the degree of discretion that the worker had over his or her time (See Astrolabe Marine Inc. BC EST #D525/97).

In this case, Campbell held herself out to be a contractor, but that action did not determine her status. Certainly her work was that normally performed by an employee. She was under the control of Vitality and was integrated into its operation. She owned no tools, and she had no opportunity for profit or loss. At the time in question, she had no other employment or contract of service. She did exercise some control over her hours of work, but her testimony contradicts Grant's evidence on this point. Flexibility of hours is only one element in determining employee status, and not a particularly important factor. In this case the type of work Campbell performed and the degree of control Vitality exercised over her work clearly pointed to her status as an employee. On the balance of probabilities, I conclude that Campbell was an employee of Vitality under the Act.

If Campbell was an employee, the following issue is the rate of pay to which she was entitled. The only contract between Campbell and Vitality called for her to be paid \$2,000 per month. Effective on January 1, 1996, Campbell and Consolidated Firstfund entered into another contract. While Campbell proposed a new contract on November 3, 1995, but Vitality did not accept that proposal. Campbell continued to work through November and December 1995, invoicing Vitality as she had previously. Vitality continued to pay her the \$750 per pay period as it had before November 3. Campbell's work did not change. Based on the evidence before me, I conclude that the contract of employment between Campbell and Vitality from May 15, 1995 through December 31, 1995 was \$2,000 per month, with \$500 to be withheld or payable in stock. There was no corroborating evidence to support Mr. Grant's statement that a portion of Campbell's compensation was based on license sales.

The Determination in question contained a reference to a meeting between a delegate of the Director, Campbell and Mr. Grant. Grant objected to any reliance on this meeting, and rightfully so. From the record, it appears that this meeting was called to attempt to obtain a settlement of the complaint. Obviously, no settlement occurred, and neither Mr. Grant nor Vitality should be held accountable for statements made under such circumstances.

Grant also argued that Campbell should be considered as one of two persons jointly engaged by Vitality. The other individual allegedly did not meet his obligations. Whatever the truth of those allegations, the Determination in question concerned compensation owed to Campbell. The Act covers employment relationships. It is not open to an employer to withhold compensation from an employee because of a dispute with another person. Vitality has access to other tribunals to pursue claims not involving an employment relationship. Similarly, Grant argued that Campbell had established a business relationship with a potential client of Vitality. If Vitality has cause for damages because of Campbell's action in that regard, it must pursue them in the appropriate forum.

The delay in issuing the Determination in this case was excessive and not explained. Campbell stated that she did not file her complaint until after she ended her employment

with Consolidated Firstfund because she was led to believe that she would receive her back pay. Her duties did not change substantially after January 1, 1996, and Grant stated that Vitality and Consolidated Firstfund had common owners. Prior to the appeal, the record contains no reference to any argument that the complaint was out of time. Given these circumstances, I conclude that Campbell filed her complaint within the time limits contained in the Act.

The Determination and some correspondence between Director's delegates and Vitality contained minor factual errors. None of these items went to the merits of the case and should not invalidate the Determination.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, the Determination of March 11, 1998 is confirmed. Campbell is entitled to \$1,716, plus interest accruing since the date of the Determination, pursuant to Section 88 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal