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 -

West Coast Hygienic Products Canada Inc.
Operating as Cantape Specialty Westcoast H.P. (Canada) Inc.
(“ Cantape ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Michelle Alman

FILE No.: 2000/381

DATE OF DECISION: August 14, 2000

DECISION

OVERVIEW

This decision addresses an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by West Coast Hygienic Products Canada Inc., operating as Cantape Specialty Westcoast H.P. (Canada) Inc. ("Cantape"), from a Determination issued May 11, 2000 by a delegate of the Director of Employment Standards ("the Director"). The Determination concluded that Cantape had contravened sections 4, 16, 18(1), 40(1), 58(1) and 58(3) of the *Act* by failing to pay regular and overtime compensation, as well as vacation pay owed on that compensation, for hours worked by Gina Farina ("Farina"). Additionally, for Cantape's violations of the above-listed sections of the *Act*, the Determination contained a $0.00 penalty assessment against Cantape pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation* (the "*Regulation*").

Cantape, by its counsel, appeals from the Determination, alleging that Farina was an independent contractor and not its employee, hence the contractual relationship was not covered by the *Act* and no monies are owed. Cantape further alleged in its appeal that it suspected Farina had done no work for Cantape and had, in fact, spent her time working on other sales. Cantape raised no issue on appeal over the Determination's calculation of the amount owed to Farina or the $0.00 penalty assessment.

The parties made written submissions in this appeal. Farina's submissions included a letter of support from Dorn Beattie ("Beattie"), an independent witness. Cantape's counsel alleged in its appeal that Beattie was biased against Cantape, and offered reply submissions further to the Director's, Farina's and Beattie's submissions.

ISSUES

The issues to be decided are whether Farina was an employee of Cantape or an independent contractor, and if so, whether she performed work for Cantape.

THE FACTS AND ANALYSIS

Cantape manufactures a variety of industrial specialty tapes and packaging materials. Farina was hired by Cantape effective February 15, 2000 to work in the position of Sales Representative. Cantape in its submissions supplied a copy of the written offer of employment dated February 17, 2000 and the offer's addendum agreement, both signed by Farina on February 22, 2000. The offer recited that Farina would be paid:

> "commission of 20% of the mark up on sales; meanwhile, for a period of two months, a bi-weekly advance payment on commission of $1,000.00 will be paid which, will be deducted form [sic] commissions earned."

The offer also stated that Farina was to be on a two-month probationary period, and in the event that she was found unsuitable, "no cause or notice will be necessary during this period." The offer closed by saying,

> "We are pleased you have accepted our position, Georgina, and we look forward to having you as part of the 'Cantape Specialty Canada Team'."

The addendum to the offer specified that Farina was not to do paid work for any other employer "either during or outside of your working hours" while engaged to work for Cantape.

Farina alleges that she began working for Cantape on Tuesday, February 15, 2000, and that Cantape failed to pay her the agreed $1,000.00 advance against sales commission after her first two weeks of work. She states in her submissions that she had several training meetings with Cantape's principal, Mohammed Lotfioff ("Lotfioff"), and that because Cantape provided her with no work space, she was required to work from her own home to conduct sales and make sales calls. Farina also said she had to develop Cantape sales presentation materials, which she did with the help of Beattie. Farina submitted a copy of those materials along with copies of her substantial notes concerning her sales contact efforts and parts of her appointment calendar.

Beattie submitted a letter indicating that he had observed Farina at training sessions with Lotfioff at Cantape's factory. At those sessions he observed, Beattie stated that Lotfioff was continually changing his mind about what he required Farina to do. Beattie also acknowledged in his letter that he was an independent consultant, and that he had an ongoing dispute with Lotfioff over payment for his services to Lotfioff. Beattie's letter clearly indicates a strong distrust of Lotfioff, though not a strong dislike of him.

Farina alleges that when she sought her initial $1,000.00 advance from Cantape after her first two weeks of work, Lotfioff told her that his bookkeeper had forgotten to bring his cheque book. He asked her to return on Friday for her cheque. On the Friday, March 3, 2000, Farina alleges she was told the cheque would be ready on the following Monday. On the Monday, March 6, 2000, Farina states she received a telephone message from Lotfioff. His message said that he understood she needed more time to develop sales, but that his financial circumstances meant that he could not provide her the expected payment at that time. His message also stated that he wanted her to continue to work. Farina says in her submissions that she saved that answering machine message.

Farina states in her complaint to the Employment Standards Branch ("the Branch") that she worked until March 13, 2000. A letter dated March 10, 2000 submitted by Cantape indicates that Lotfioff terminated Cantape's original contract with Farina because she had not been able to generate any orders. The March 10, 2000 letter also attempted to modify the payment arrangement with Farina by stating Cantape would not pay any money to Farina unless she made sales, but that Cantape would pay her the originally agreed 20% of mark up as her commission on any sales she did complete. There is no indication in the letter or in Cantape's appeal as to the date on which the letter was actually delivered to Farina. Farina filed her complaint with the Branch electronically on March 22, 2000 claiming that she was never paid anything between February 15, 2000 and March 13, 2000, and that she worked between 8-10 hours per day, 5.5 days per week.

Section 1(1) of the *Act* states in relevant part:

> *Definitions*
>
> *(1) In this Act:*
>
> ***"employee" includes***
>
> *(a) a 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,*
>
> *...*
>
> ***"employer"** includes a person*
>
> *(d) who has or had control or direction of an employee, or*
>
> *(e) who is or was responsible, directly or indirectly, for the employment of an employee;*
>
> *...*
>
> *"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*

Section 4 of the Act provides:

> ***Requirements of this Act cannot be waived***
>
> ***4*** *The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect....*

Section 16 of the *Act* states:

> ***Employers required to pay minimum wage***
>
> ***16*** *An employer must pay an employee at least the minimum wage as prescribed in the regulations.*

Section 40(1) of the *Act* provides in relevant part for overtime wages to be paid as follows:

> ***Overtime wages for employees not on a flexible work schedule***
>
> ***40*** *(1) An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38*
>
> *(a) 1 ½ times the employee's regular wage for the time over 8 hours...,*

while section 58(1) of the Act indicates in relevant part how vacation pay must be determined:

> ***Vacation pay***
>
> ***58*** *(1) An employer must pay an employee the following amount of vacation pay:*
>
> *(a) after 5 calendar days of employment, at least 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay;*

Sections 18(1) and 58(3) of the *Act* dictate that wages and vacation pay owing at an employee's termination must be paid within 48 hours after the employer terminates the employment.

The question of whether someone is an employee or an independent contractor can be determined in part by reviewing the following common law factors noted in the *Larry Leuven* decision, BC EST #D136/96:

- control by the employer over the work;
- ownership of tools;
- chance of profit/risk of loss;
- remuneration of staff;
- discipline/dismissal/hiring;
- perception of the relationship;
- intention of the parties; and
- integration into the employer's business.

Regard must also be had for the remedial nature of the *Act*, which demands liberal interpretation of its provisions, including the definitions: *Fenton v. Forensic Psychiatric Services Commission* (1991), 56 BCLR (2d) 170 (B.C.C.A.).

In the instant case, Cantape produced as part of its appeal a document which I find is clearly an offer of employment. Cantape alleges that the relationship between itself and Farina was in the nature of a contract for Farina's services as an independent contractor, yet the alleged contract contains no use of that term. To the contrary, the document confirms Cantape's offer to Farina "of the position of Sales Representative," and welcomes her as "part of the 'Cantape Specialty Canada Team.'" The document lays out Cantape's terms for Farina's remuneration and places her on a probationary period, indications that Cantape had full control over the terms of employment. There was no mention of, for example, requirements concerning when and how Farina had to invoice Cantape for payment for her services. Moreover, the document required that Farina sign it "To indicate your [her] acceptance of these terms of employment outlined herein and the enclosed Addendum I...". And the Addendum, which also required Farina's signature, contained a provision indicating that Farina could not work at "any other paid employment either during or outside of your working hours." The offer purported to allow Cantape freedom from the *Act's* requirements of written notice or payment in lieu of notice should Cantape unilaterally determine that Farina was unsuitable during the probationary period.

Clearly, Cantape perceived itself as employing Farina at the outset of the relationship. Farina's signature on both employment offer documents indicates that she saw also herself as accepting employment with Cantape. The agreement's inclusion of Cantape's requirement that Farina do no other paid work for anyone else at any time during the employment relationship's duration meant that Farina would have no chance for independent profit or independent risk of loss. Farina's and Beattie's submissions both cite Cantape's principal, Lotfioff, as training Farina and giving her changing direction as to what work to perform. While Farina worked from her home and had to prepare sales promotion materials, I find that those factors are not sufficient to overcome the other factors supporting the evidence that Farina was employed by Cantape and not an independent contractor. Farina was an employee of Cantape under the *Act* and therefore entitled to be paid at least the minimum wage, overtime for hours worked in excess of 8 hours per day, and vacation pay on those amounts.

Cantape also alleged in its appeal that it had no evidence that Farina did any work for it. I find that the copies of Farina's sales contact notes, appointment book, and sales promotion materials are sufficient evidence to conclude that she performed work for Cantape pursuant to the *Act's* definition.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination issued May 11, 2000.

Michelle Alman
Adjudicator
Employment Standards Tribunal