

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 -

Western Cheese Ltd.
("Western")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 97/361

DATE OF HEARING: July 21, 1997

DATE OF DECISION: August 5, 1997

DECISION

OVERVIEW

The appeal is by Western Cheese Ltd. (“Western”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) against two Determinations of the Director of Employment Standards (the “Director”), both dated April 24, 1997. In one of the two Determinations Western is found to owe Kenneth Wright salary, statutory holiday pay and vacation pay. In the second Determination, Western is found to have failed to keep and produce records required by the *Act*. That Determination imposes a \$500 penalty on Western.

APPEARANCES

Yaddy Kallu	General Manager of Western Cheese
Allison Seller	Witness
Parveen Kallu	Witness
Kenneth Wright	On his own behalf
John Hartman	For the Director

ISSUES TO BE DECIDED

At issue is the matter of whether or not Wright was an employee. Western argues that Wright was engaged as an independent contractor.

Should it be found that Wright was an employee, his rate of pay is then an issue. In the Determination, Wright’s pay is found to have been \$1,500 per month. Western argues that was not his pay for the period in which wages are found owing, that his pay was a 2 percent commission on sales.

At issue is the penalty which has been imposed on Western for a failure to keep and produce records. Western argues that it did not have to keep records for Wright because he was not their employee. The Director accepts that if Wright was not Western’s employee, then there should be no penalty for failing to keep and produce records.

FACTS

Through a posting at a Canada Employment and Immigration office, Kenneth Wright learned that Western Cheese had an opening for a salesperson. The job was said to be

permanent, full time and pay \$1,500 per month to start. The contact person was a person named "Bobby".

Wright contacted Western and was interviewed by Bobby Kallu in the presence of his father, Santokh Kallu. Parveen Kallu was in the next office. As a result of that interview, Wright began work as salesman for Western on May 8, 1996. Western had no other salespersons.

Western paid Wright at a rate of \$1,500 a month to the end of September. In August Yaddy Kallu discussed with Wright the idea that he be paid commissions only. Western unilaterally altered Wright's rate of pay on October 1, 1996, imposing on him a scheme that had him earning no salary, just a 2 percent commission on sales. Wright's earnings for October and November were \$71.23 and \$101.14, respectively. In a letter dated November 20, 1996 Wright advised Western that he had decided to resign his employment, stating that "he could not afford to work for nothing". His last day of work was November 22, 1996.

Western never made the standard deductions for income tax, Canada Pension and Employment Insurance. That was left to Wright at his request.

Western issued a series of cheques made out to "Ken Wright" but one dated June 1, 1996, cheque number 0430, is made out to KEN - KNS Enterprises. There is also an expense claim by Wright on which he wrote "please make cheque out to KNS Enterprises". KNS Enterprises is a business once operated by Wright. He admits that he would have preferred it if Western had made all of his cheques out to KNS rather than himself. In his view there are tax advantages.

Wright did not sell Western's cheese products operating as KNS, that is the evidence. Wright represented Western as its public relations/marketing representative. A business card makes that clear.

Wright's usual work day began at Western's office. He worked a 40 hour work week. If Western found a prospective customer, it passed that information along to Wright who would then pay them a visit. Wright kept a record of his work and gave Western reports on what he did and what he thought were the chances of making sales to the various groups and individuals that he called on.

ANALYSIS

The *Act* has no application in the absence of an employer-employee relationship. Is there one in the case of Wright? Of paramount importance is the *Act*.

In section 1 of the *Act* are definitions of "employee", "employer", and "work". They are as follows:

“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 the 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;*

“work” means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.

The above definitions are to be given a liberal interpretation. That is the view of the BC Court of Appeal. In *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170 the court noted,

“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 casts a wide net to cover a variety of circumstances.”

The matter of whether or not a person worked or is working as an employee is not the most straightforward of matters [*Hospital Employees' Union, Local 180 v. Cranbrook & District Hospital*, (1975) 1 Can. L.R.B.R. 42 at 50].

The difficulty is that there is no single element in the normal makeup of an employee which is decisive, and which would tell us exactly what point of similarity is the one which counts. Normally, these various elements all go together but it is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee But while the legal conception of an employee can be stretched a fair distance, ultimately there must be some limits. It cannot encompass individuals who are in every respect essentially independent of the supposed employer.

Various tests are of aid in deciding whether a relationship is one of employment. As set out in the decision of the Tribunal, *Larry Leuven* (1996) BCEST No. D136/96, the Tribunal will consider several factors including:

- Control by the employer over the work;
- ownership of tools;
- chance of profit/risk of loss;
- remuneration of staff;
- who has the power to discipline, dismiss, and hire,
- the parties perception of their relationship;
- the intention of the parties; and
- degree of integration.

Wright presented himself as the business, KNS, for tax purposes and Western made none of the usual deductions that Revenue Canada demands. But when I consider each of the above factors it is clear to me that Wright was an employee and is covered by the *Act*. He answered a posting for an employee. His work is work normally performed by an employee. Western exercised a degree of control over Wright which is consistent with the control normally exercised by employers over commission salespersons. Remuneration was set by Western such that there was no chance of profit or loss. Wright as its only salesperson was an integral part of Western's business. And while Wright requested that cheques be made out to KNS, the evidence is that he did not work under the name of KNS Enterprises, or any version of that name, while performing work for Western.

Western argues, contrary to the finding of the Director, that Wright's pay was not \$1,500 per month for the period in which wages are found owing, but a 2 percent commission on sales. I agree with Western. That it unilaterally altered Wright's pay on October 1, 1996 is clear, as is the new pay rate, namely a 2 percent commission on sales, and that Western had the power to alter the terms and conditions of Wright's employment, there being no agreement preventing it.

Western convinces me that Wright's rate of pay for October and November, 1996 was not \$1,500 a month but a 2 percent commission on sales. Western does not owe Wright moneys as calculated and for the reasons set out in the Determination. But that is not the end of the matter. It cannot be given the *Act*.

Western has paid less than the minimum wage, and in cutting Wright's wages as drastically as it did, it forced his resignation. The Director has not given any consideration to such matters, the attention of her delegate being diverted from doing so when it was wrongly concluded that Wright's pay was \$1,500. As such I am referring back to the Director, the matter of what Wright is entitled to under the *Act*, now that it has been decided that he was an employee and that he was paid only 2 percent of sales, or \$71.23 in October and \$101.14 in November.

Given that I have found that Wright was an employee of Western Cheese, the penalty will stand. It is clear to me that Western failed to keep the records which are required by the

Act for employees and, as a result, failed to produce them when ordered to do so by the Director.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination which is dated April 24, 1997 and which imposes a penalty of \$500 for a failure to keep and produce records be confirmed.

I order, pursuant to section 115 of the *Act*, that the Determination, dated April 24, 1997 and pertaining to the payment of wages and other moneys, be confirmed in its finding that Wright is an employee, but refer back to the Director, the matter of what Wright is entitled to under the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc