

**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 -

Hooked on Fishing Adventures Inc.  
("HOFA")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	Hans Suhr
<b>FILE No.:</b>	97/413 & 97/414
<b>DATE OF HEARING:</b>	August 29, 1997
<b>DATE OF DECISION:</b>	September 8, 1997

## DECISION

### APPEARANCES

Lisa Vagar	on behalf of Hooked on Fishing Adventures Inc.
Henry Vagar	on behalf of Hooked on Fishing Adventures Inc.
Janet Breckman	on her own behalf

### OVERVIEW

There are 2 Determinations being appealed by Hooked on Fishing Adventures Inc. (“HOFA”), under Section 112 of the *Employment Standards Act* (the “Act”). Those Determinations are dated May 2, 1997 (File No. 97/413) and May 15, 1997 (File No. 97/414) and issued by a delegate of the Director of Employment Standards (the “Director”). HOFA alleges that the delegate of the Director erred in the Determination dated May 2 by concluding that Janet Breckman (“Breckman”) was an employee of HOFA and further erred by concluding that HOFA had contravened Sections 16, 17, 18, 21, 45, 58 and 83 of the *Act*. The Director’s delegate concluded that HOFA owed Breckman wages in the total amount of \$3,030.10 .

With respect to the Determination dated May 15, the delegate concluded that HOFA had contravened the *Act* and issued a \$0.00 penalty. HOFA alleges that as Breckman was not an employee, the penalty Determination is inappropriate.

### ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Was Breckman an employee of HOFA ?
2. If the answer to No. 1 is yes, are wages owing to Breckman ?
3. Is the penalty Determination appropriate ?

## FACTS

The following facts are not in dispute:

- HOFA placed an advertisement in the Vancouver Sun newspaper which read “*Vancouver based outdoor fishing & adventure company seeks exp’d Sales rep to expand client base. Exp. with computer software is required. Guarantee + commission. Send resume and refs to Box 659, this paper.*”;
- Breckman was a successful respondent to the advertisement;
- Breckman performed work from January 29, 1996 until July 2, 1996;
- Breckman solicited clients on behalf of HOFA;
- HOFA kept no record of hours worked by Breckman;
- Breckman initially worked from HOFA’s office and later worked from her own home;
- the delegate of the Director contacted HOFA on December 5, 1996 to discuss Breckman’s complaint;
- HOFA filed a notice of claim in the Provincial Court of British Columbia (Small Claims Court) on December 10, 1996, alleging breach of contract by Breckman

I received a great deal of evidence both verbal and documentary from all parties and I will not attempt to repeat verbatim all of it. I will however, highlight the relevant evidence.

Both Lisa Vagar (President) and Henry Vagar (Vice-President) of HOFA testified and stated that:

- Breckman was not an employee of HOFA, she was an independent contractor;
- Breckman was aware that she was considered an independent contractor;
- Breckman was provided with a document titled “Contract Opportunity” which clearly meant she was an independent contractor;
- the “Contract Opportunity” document indicates that the guarantee of \$1,500.00 per month is only for the 3 month probationary period;

- Breckman did not raise any concerns with respect to her status during the period January 29 - July 2, 1996;
- Except for a weekly sales meeting, Breckman was free to set her own hours;
- another sales rep, Bruce Hargot, clearly accepted and operated on the basis of being an independent contractor;
- HOFA never made any statutory deductions for C.P.P., E.I. or Income Tax;
- Breckman was advised on or about April 20, 1996 that the monthly guarantee would cease as of April 30, 1996 and thereafter she would only be paid on the basis of commissions earned;
- HOFA only provided direction on basic procedural issues;
- alternatively, should the Tribunal accept that Breckman was an employee, she would have only been so until April 30, 1996 after which she began to work in her own home;
- HOFA did not exercise control over Breckman after May 1, 1996 as she worked in her own home and was free to work when she chose;
- after May 1, 1996 Breckman provided all her own tools, space, equipment, telephone, etc.;
- after May 1, 1996 the HOFA calls were call-forwarded to Breckman's home for her to answer;
- telephone records clearly indicate that Breckman did not work 8 hours per day;
- after May 1, Breckman did not submit any request for reimbursement of mileage costs;
- the appropriate jurisdiction for Breckman's complaints would be the courts;

In response to a question from the Tribunal, HOFA stated that usually the client would pay HOFA the full amount of the package sold and after the package had been provided to the client by the supplier, the supplier was paid and commissions calculated for the sales reps

involved. On some occasions, the client would pay the supplier directly and the supplier would then forward the appropriate fee to HOFA.

Breckman, on her own behalf, states:

- she responded to an advertisement for a sales representative;
- she was required to perform a great deal of office work at first as the company was just getting started;
- she worked out of the HOFA office (the Vagar's home), every day from January 29 to May 10, 1996;
- HOFA provided her with a list of expected duties to perform;
- she would also travel outside of the HOFA office to drop off brochures, contact clients personally, postage deliveries, research, etc.;
- HOFA presented her with an Agenda at their first sales meetings which further set out duties for her;
- she does not recall any meeting on or around April 20, 1996 to discuss a change in the work practices or her remuneration;
- she worked at least 8 hours Monday to Friday during her period of employment with HOFA;
- she was provided with business cards which identified her as "Sales and Marketing" for HOFA;
- she approached HOFA on May 3, 1996 and requested to work out of her own home as with the repair work scheduled for the 2nd Narrows bridge, her commuting time would be greatly increased;
- HOFA agreed to permit her to work from her home commencing May 10, 1996;
- HOFA arranged to have their telephone call forwarded to her home;
- on May 10, 1996, Breckman "pulled up the computer records on the HOFA computer" so she could continue the work from her home;
- HOFA telephone bills to July 2, 1996 clearly indicate that calls were forwarded on a regular basis to Breckman's home;

Under cross examination by HOFA, Breckman stated:

- she considered herself to be an employee of HOFA;
- she was aware that HOFA considered her as a “independent contractor”;
- she was told on May 10, 1996 that the guarantee of \$1,500.00 per month was only for the 3 month probationary period and would not be paid beyond April 30, 1996;
- she did not begin to work from her home until after May 10, 1996;
- she filed her complaint with the Employment Standards Branch when she only received \$21.40 instead of an expected \$998.34;
- she was advised by the Employment Standards Branch to file a complaint with regard to her unpaid commissions (wages);

## **ANALYSIS**

The burden of establishing that the delegate of the Director erred in concluding that Breckman was an employee rests with HOFA.

I must first consider the statutory definition of employee as found in the *Act*. The *Act* defines **employee** as:

*"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;*

The Act defines **employer** as:

*"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;*

The Act defines **work** as:

*"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*

I must further consider the various tests which are used to distinguish employees and independent contractors. It is, in my view, not necessary to review all of the tests in order to determine whether a relationship was one of employee/employer or one of principal/independent contractor. It is however, necessary that sufficient tests be reviewed in order to enable a proper determination on the status of the individual to be made.

I have reviewed the tests (four fold and organizational/integration) applied by the delegate of the Director in this matter. I am satisfied that the application of those tests clearly indicate that Breckman was an employee.

Where the evidence of Breckman and HOFA differs, based on the balance of probabilities, I prefer the evidence of Breckman.

For all of the above reasons, I conclude that Breckman was an employee of HOFA.

I further conclude that the calculation of wages owing as calculated by the delegate of the Director and set forth in the Determination is correct in all respects.

With respect to the issue of the Determination dated May 15, 1997, having already concluded that Breckman was an employee of HOFA, I further conclude that the Determination in the penalty amount of \$0.00 was appropriately issued.

The appeal by HOFA is therefore dismissed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated May 2, 1997 be confirmed in the amount of **\$3,030.10** and I further order that the Determination dated May 15, 1997 be confirmed in all respects.

**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**