

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 -

Harbinder Singh Sewak operating as
South East Asia Post
("the Post")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE No.: 97/543

DATE OF DECISION: September 17, 1997

DECISION

OVERVIEW

This is an appeal by Harbinder Singh Sewak operating s South East Asia Post (“the Post”), under Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination which was issued on June 24, 1997 by a delegate of the Director of Employment Standards. The Director’s delegate found that the Employer owed wages, vacation pay, statutory holiday pay and interest in the amount of \$1,599.36 to a former employee, Chin Tao Lee. This appeal is brought on the ground that Chin Tao Lee was a contractor rather than an employee and , therefore, the Determination should be cancelled.

This decision is based on my review and analysis of the Determination and the parties written submissions. Chin Tao Lee currently resides in Selangor, Malaysia.

ISSUES TO BE DECIDED

The issue to be decided is whether Chin Tao Lee is entitled to wage amount as set out in the Determination.

FACTS

The Director’s delegate addressed two issues in the Determination: was Chin Tao Lee an employee of the Post and, if he was an employee, was he paid all wages to which he was entitled under the *Act*?

The Determination sets out the following Evidence and Findings as the basis on which the Director’s delegate concluded that Lee was and employee of the Post and was owed wages:

Evidence

Records were requested of the Post and a copy of the contract between the Post and Lee was faxed to the Branch. The Post stated the Lee was a contractor, not an employee and provided the contract as the only evidence of such. No other records were provided. The contract was signed by Lee and by Harbinder S. Sewak on behalf of the Post. The contract sets out terms and conditions of employment, including a commission structure.

Lee provided a photocopy of a cheque in his name from the Post along with a detailed calculation of hours worked, amount paid and amounts

owing and a copy of the contract that matched the one provided by the Post. Lee stated that he worked a regular 40 hour week in his capacity as an Account Executive at the Post except for noted leaves. He stated that he was not paid minimum wage by the Post and was entitled to it, as his work was directly under the direction of and solely on behalf of the Post.

Findings

Using the normal tests for an employee I find that the Post was the sole beneficiary of Lee's employment. Irrespective of the contract of employment, or method of calculating remuneration, I found nothing in the employer's evidence to support the claim the Lee was independent of the Post, nor anything to contract Lee's position that he worked a regular 8 hour day on behalf of the Post. Accordingly, I find Lee an employee of the Post and entitled to all provisions of the *Act*, including minimum wage and vacation pay. As Lee was employed more than 30 days he was entitled to statutory holiday pay also.

There is no dispute that Chin Tao Lee was an Account Executive who was paid commission from August 15, 1997 to October 21, 1997. This is confirmed in the Post's Reasons for Appeal dated July 18, 1997.

The contract between the Post and Chin Tao Lee which is signed and dated on August 13, 1996 is titled "Southeast Asia Post Account Executive" and contains the following terms, *inter alia*:

1. Salary is based on commission. An allowance of \$150 per week (\$600 per month) is payable for a full time employee (based on Minimum 40 hours per week). All commissions will be paid to the account executive as and when these are received from the advertiser.
2. A ten per centum (10%) commission will be paid on all advertisements procured by the account executive for the reasons directory and The Southeast Asia Post and its supplements.
3. An account executive shall not solicit any other advertisements from the client or try to divert the client to any other form of media and advertising except for and other than representing supplements of the Southeast Asia Post and its subsidiaries.
4. No monies shall be payable to the account executive in the event the account executive has given false information or has brought disrepute to Southeast Asia Post or to its employed or commissioned personnel.

The reasons given by the Post for this appeal acknowledge that while Lee "...worked on a commission based structure, he was in control of his working hours and days. There was never a work schedule posted nor was he required to sign in or out." In its submission of August 28, 1987 the Post stated that Lee "...knowingly agreed and knew that he worked on an allowance/commission-based structure." The Post also acknowledges that it owes \$465.92 in unpaid allowance commissions to Lee for the period October 1-21, 1996.

In his response to the Post's appeal, Lee describes how Mr. Sewak "briefed (him) on the advertisements to solicit for upcoming issues..." such as the Automobile Supplement or the Food Supplement. This briefing included direction concerning prospective advertisers, the reasons for the supplement, target market, circulation, obtaining artwork and providing quotations. Lee's submission also describes at length his daily routines in the Post's offices and denies removing any of the Post's property.

The Post's submission of August 28, 1997 does not give any particulars to refute Lee's submission.

ANALYSIS

This is an appeal by the Post. As the appellant, it bears the onus of establishing that the Determination is flawed and, therefore, that it should be varied or cancelled. The Director's delegate conducted an investigation of Mr. Lee's complaint, made certain findings which were supported by reasons and determined that he is owed wages.

When I consider the findings contained in the Determination and the parties' written submissions I am unable to find any ground on which to vary or cancel the Determination. The central point of the Post's appeal is that because Lee was paid a commission he was not an employee. To be blunt, this reflects a gross misunderstanding of the scope of the *Act*. Section 1(1) of the *Act* defines an "employee" in very broad terms, none of which depend on the form of remuneration paid by the employer. It also defines "wages" as including "salaries, commissions or money paid or payable by an employer to an employee for work."

I concur with the findings made in the Determination by the Director's delegate. In addition, I note that the first term of Lee's employment contract describes the salary structure by which an account executive will be paid, including an allowance of \$150 per week (\$600 per month) for a **full time employee** (emphasis added).

For all of these reasons I find that the Determination should be confirmed.

ORDER

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

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC/sf