

An appeal

- by -

Gateway File Systems Inc. ("Gateway")

-and by-

Calvin E. Lee ("Lee")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: M. Gwendolynne Taylor

FILE No.: 2001/92 & 2001/388

DATE OF HEARING: July 9 & July 18, 2001

DATE OF DECISION: September 17, 2001

DECISION

APPEARANCES

Brian Harper	Gateway File Systems Inc.
Tracey Lee Lorenson	Counsel for Calvin Lee
Calvin Lee	
Herbert Van Kampen	
Karyn Luttmer	Delegate of the Director of Employment Standards

OVERVIEW

These are appeals pursuant to section 112 of the *Employment Standards Act* (the “Act”) of Determinations issued by the Director of Employment Standards (“the Director”). These appeals were heard at the same time as appeals by Herbert Van Kampen and Gateway File Systems Inc. from a Determination issued February 16, 2001.

On January 9, 2001, the Director issued a Determination concerning a complaint filed by Calvin Lee (“Lee”) against Gateway File Systems Inc. (“Gateway”), in which Lee sought \$41,272.73 compensation for time worked between June 1998 and February 28, 1999 (“the disputed period”). The Director found that Lee commenced employment with Gateway on September 15, 1997, performed work for Gateway during the disputed period, and his period of employment was uninterrupted. The Director could not determine what hours Lee worked during the disputed period. The Director closed the file without making a determination on compensation.

Lee appealed the Determination asking the Tribunal to vary the Determination to award the compensation sought.

Gateway also appealed the Determination asking the Tribunal to revoke the Director’s Determination that Lee had employment status during the disputed period.

ISSUES

1. Did the Director err in determining that Lee was employee?
2. Did the Director err in determining that it was not possible to make a determination on the compensation owed.

FACTS

Lee commenced employment with Gateway in September 1997 as Director of the GIFTS program. He was given a letter of termination in June 1998, due to financial insolvency.

Although Gateway owed him approximately 9 months salary, Lee continued providing services during the disputed period and on March 1, 1999, entered into a new contract with Gateway, with provision for deferred salary payment.

In May and June 1998, Gateway issued letters to all employees terminating their employment. In the letter of May 20, 1998 to Lee, Harper stated:

“We are hopeful that investment funds will soon be received that will allow the company to continue normal operations. If this happens on or before your termination date, the company will recind (*sic*), with your approval, this notice of termination. If the company fails to do so, and permits you to report for work after your termination date, then your employment will also be continued as before. In either case, you would then be entitled to the same notice period in connection with any subsequent notice of termination.

From June 1998 to January 1999, he traveled to San Francisco 4 times and to Washington D.C. once, on Gateway business. On some trips he accompanied Harper; on others, he traveled alone. When he was not travelling, he attended the office daily and attended meetings as a Gateway representative. When Harper was away from the office, Lee took the client calls.

Lee submitted expense invoices to Gateway for travel and general office and meeting expenses, including office coffee and postage.

Gateway represented to clients, potential clients, financiers, government representatives, and others, that Lee was an integral part of Gateway. In the November 1998, Business plan for E-CLIPS Marketing Corporation, a Gateway company, Lee is described as the General Manager of Gateway, who “will be responsible for oversight of the technology implementation phase as the e-clips family is introduced to the market.” In Gateway’s 1999 business plan, Lee is listed as Chief Operating Officer. The 1999 GIFTS business plan is identical to the 1999 Gateway business plan. Lee had Gateway business cards which identified him as the General Manager.

Gateway used letters of engagement for contractors during this time. For example, there is a July 21, 1998 contract between Gateway and Marty McLeod for a fixed price, payable when Gateway is paid by the client. There is no similar letter of engagement for Lee.

On March 1, 1999, Gateway and Lee signed a contract for Lee to become Vice President and Chief Operating Officer. Clause 3:01 (A) establishes the salary as \$60,000 per annum; Clause 3:01 (D) “signing bonus” provides:

“In addition to compensation and expenses, as previously agreed, for duties performed from June 15, 1998 to date of this Agreement (at a contract rate of \$5,000/Month, payable to Paragon Strategic Services), the Company shall grant 50,000 shares of the common stock of the Company to the Executive, subject to certain restrictions on resale.

Also on March 1, 1999, Lee submitted an invoice to Gateway, on Paragon Strategic Services (“Paragon”) letterhead, for services from June 15, 1998 to the end of February 1999, in the amount of \$41,272.73, broken down by month. Lee had provided services to another organization during this period and he deducted the time spent on that contract from the monthly salary payable by Gateway.

Lee terminated his employment in December 1999. In letters dated December 13, 1999 and December 15, 1999, Gateway calculated the compensation owing under the March 1, 1999 contract and arranged for payment by January 15, 2000. Gateway acknowledged the amount claimed by the March 1, 1999 Paragon invoice, and noted that it ranked equally with all other creditors and behind the bank.

Lee filed a complaint with the Employment Standards Branch on June 6, 2000, claiming compensation for the disputed period, as per the invoice, plus interest.

SUBMISSIONS

Lee

Lee claimed that he is entitled to reimbursement as an employee during the disputed period. The March 1, 1999 contract and the Paragon invoice clearly show that Gateway accepted that he had provided services and accepted the amount of compensation owed. Gateway allowed him to perform work normally performed by an employee and, therefore, he falls within the statutory definition of “employee.”

Rick Wallace, the controller, testified that after the June 1998 termination notices, it appeared that most of the staff remained at the office. However, the only two for whom month salary accruals were entered in the books were Van Kampen and Calvin Lee.

Lee submitted that he also fell within the common law definition of “employee”, based on the control and integration tests.

Gateway

Gateway submitted that the company was clear in saying that it could no longer afford to employ anyone. Gateway allowed the terminated employees to use the office facilities for their own purposes. When Lee was in the office he performed tasks which assisted the company with an appearance of continuing operations.

Gateway claims the Lee is not entitled to any compensation because he simply volunteered his time. Harper referred to the “special rules” in the *Act* for high tech companies and submitted that during the disputed period Lee was engaged in a venture role with the prospect of some future payment if his efforts were successful. His continued involvement in the company during

the disputed period was wholly speculative. In this, Lee was prospecting for future opportunities and hoping that Gateway would be successful.

In the alternative, if indeed Lee is entitled to compensation, it is as a contractor, not an employee. If there was an agreement between Gateway and Lee during the disputed period, it was on the understanding that if any of the ventures were successful in bringing in funding, Lee would be entitled to share in the proceeds. Other contracts were entered into during this time, such as that for Mr. McLeod which provided for fixed price and payment when Gateway received payment. There was no such contract with Lee.

REASONS AND DECISION

The Director determined that Lee was an employee. I concur for the reasons that follow.

Liability for services rendered

The contract dated March 1, 1999, the Paragon invoice of the same date, and the letters of December 13 and 15, 1999, clearly establish that Gateway acknowledged a liability to Paragon Strategic Services for services rendered from June 15, 1998 to the end of February 1999. I accept the uncontroverted evidence that Lee was the sole owner of Paragon and that he performed the services that were the subject of the invoice. I find that the reference in Clause 3:01 D. to the compensation “as previously agreed” was for the amount specified in the March 1, 1999 invoice, \$41,272.73.

I reject Harper’s submissions that Lee was voluntarily providing services, or that his involvement was purely speculative. While there was an element of speculation in all of Gateway’s ventures, Lee had an employment contract before and after the disputed period and the services he provided during the disputed period were much the same.

Accordingly, I find that Gateway was indebted to Lee for services rendered either as a contractor or an employee.

Contractor versus Employee

In Section 1 of the *Act*, employee is defined, in part, as

“employee” includes ...

(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee, ...”

I find that during the disputed period, Lee was an employee, not a contractor, for the following reasons:

In the termination letter of May 1998, Harper stated that if Gateway permitted Lee to report to work after the termination date, his employment would be continued as before and he would again be entitled to the notice period for termination. Harper says this letter was replaced by the June 1998 letter. Regardless, I find that this letter indicated an intention that Gateway would be endeavouring to continue normal operations and, given the subsequent events, I find that the stated intentions in the letter lend definition to a continuing employment relationship.

The services Lee provided during the disputed period were similar to his duties before and after the June 1998 termination letter. Gateway was aware of the services he provided, and promoted him as an integral part of the company. It was only when the parties came to execute the March 1, 1999 agreement that the invoice was provided. It was based on the pre-June 1998 monthly salary.

The only evidence that supports Gateway's argument that Lee was a contractor is the wording in the March 1, 1999 agreement "at a contract rate of \$5,000/Month, payable to Paragon Strategic Services" and the invoice in the name of Paragon. In this case, I find that the parties had not agreed in advance that Lee was a "contractor." However, even if they had, it is not the labels parties attach that are determinative of whether a relationship is employee or contractor, rather it is the nature of their daily relationship. Further, the fact that an employee invoices through a company does not negate an employee/employer relationship. (*Nationwide Business Centre (1989) Ltd.* BC EST #D356/96; *Park Ridge Homes Inc. (Re)* BC EST #D251/00; *Horwath (c.o.b. Cedar Crest Mobile Home & RV Park) (Re)* BC EST #D148/96; *J. Duperron Timber Co. Ltd.* BC EST #D429/00)

Regulation section 37.8 addresses exclusions for high tech companies. I have reviewed those provisions and find nothing there that suggests that Lee's relationship with Gateway does not entitle him to compensation as an employee.

In addition to the statutory definitions of "employee", "employer" and "work", there are common law tests to aid in determining whether someone is an employee or contractor. These include the "control test" to determine whether the person is under the control and direction of the employer in the selection, dismissal, method of work, and remuneration; the "four-fold test" which considers control, ownership of tools, the chance of profit and the risk of loss; and the "integration" or "organization" test to consider whether the person's contribution is an integral part of the employer's operations and organization.

Applying the statutory definitions and the common law tests, I find that Lee was an employee during the disputed period just as he was during the periods preceding and succeeding the disputed period.

Quantum

I find that the Director erred in not accepting Lee's statement of the compensation owing. This has been acknowledged and accepted as owing by Gateway in the March 1, 1999 contract and the December 15, 1999 correspondence. In addition to the acknowledged compensation, Lee is entitled to vacation pay.

I find that Gateway owes Lee \$41,272.73, plus vacation pay of \$1,650,91, plus section 88 interest.

Penalty

Lee requested that the Tribunal exercise its discretion to impose a monetary penalty on Gateway. The Tribunal has no jurisdiction to do so.

ORDER

Pursuant to section 115, I vary the Determination dated January 9, 2001 and Order that Gateway File Systems Inc. pay the sum of \$42,923.64, plus interest pursuant to section 88, to Calvin Lee.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal