

An appeal

- by -

Gateway File Systems Inc. ("Gateway")

-and by-

Herbert Van Kampen ("Van Kampen")

- 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.: 2001/211 & 2001/212

DATE OF HEARING: July 9 & July 18, 2001

DATE OF DECISION: September 17, 2001

DECISION

APPEARANCES

Brian Harper	Gateway File Systems Inc.
Herbert Van Kampen	
Tracey Lee Lorensen	Counsel for Calvin Lee, assisting Mr. Van Kampen
Calvin Lee	
Karyn Luttmner	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 Calvin Lee and Gateway File Systems Inc. from a Determination issued January 9, 2001.

On February 16, 2001, the Director issued a Determination concerning a complaint filed by Herbert Van Kampen (“Van Kampen”) against Gateway File Systems Inc. (“Gateway”), in which Van Kampen claimed back wages, vacation pay and compensation for length of service. The Director determined that

- Van Kampen was an employee from March 1994 until June 30, 2000;
- Gateway did not dispute that it owed Van Kampen \$2,278.12 arrears in wages from April 1 to May 30, 2000;
- Van Kampen was entitled to vacation pay of \$2,460.00;
- Van Kampen had not substantiated his claim for compensation for length of service based on his allegation that Gateway had terminated his employment by substantially altering the terms of employment and failing to pay on a regular basis; and
- Gateway contravened Sections 16, 17, 18 and 58 of the *Act* in failing to pay minimum wage during April and May 2000, not paying wages within 8 days, not paying within 6 days of termination of employment and not paying vacation as required.

By the Director’s determination, Gateway owed Van Kampen for wages, vacation pay and interest, in the total amount of \$4,962.92.

Van Kampen appealed the Determination asking the Tribunal to vary the Determination to award compensation for length of service in the amount of \$3,807.69. He acknowledged a downward adjustment was required for wages to \$1,999.82.

Gateway also appealed the Determination disputing that Van Kampen was an employee from June 1998 through June 1999, that the agreement in June 1999 was for casual services and a defined contract, that the salary arrears for May and June 2000 were disputed because Van Kampen was off work for May 2000, and that Van Kampen is not owed the amount determined for vacation pay.

ISSUES

1. Did the Director err in determining that Van Kampen was employee?
2. If Van Kampen was not an employee during the whole period of March 1994 to June 2000, does he have any further entitlement to vacation pay?
3. Were there salary arrears for May and June 2000?
4. Did Gateway terminate Van Kampen's employment? Is he entitled to compensation for length of service?

FACTS

Van Kampen commenced employment with Gateway in March 1994 as Senior Imaging Technician. Gateway terminated Van Kampen's employment in June 1998 and issued a Record of Employment and paid him severance. Van Kampen continued to attend the Gateway offices after the termination date.

A major consideration in these appeals is the parties' disagreement over Van Kampen's status with Gateway between June 1998 and June 1999 ("the disputed period"). Van Kampen has been fully paid for his work during the disputed period. However, the characterization of his status with Gateway affects the amount of vacation pay that would accrue and, in the event he substantiates that he was terminated in June 2000, affects the amount of his entitlement to compensation for length of service.

In June 1999 the parties signed a contract of employment. In that document, Van Kampen's back pay from July 1, 1998 to June 30, 1999 is calculated to be \$11,900 and overtime is valued at \$450, or 3 days. The Terms of Engagement provide that he is to continue in his "current capacity, with its corresponding duties and responsibilities as performed to this date, ...". The contract then stipulates that all money Gateway receives from "the Ministry of Environment, Lands and Parks (the ATLAS Project) will be paid to Van Kampen until all due back money is paid." Van Kampen's salary is set at \$4,000 per month, for a 40 hour week, and overtime is set at \$25 per hour.

In April and May 2000, Van Kampen was away from work for approximately 3 or 4 weeks. He did not claim salary for one full month. At the end of June 2000, Harper proposed that the job

description for Van Kampen's position be changed from full time to on-call. This proposal was documented in an email Van Kampen received from Paul Daviss on June 30. On July 4, Harper asked him to draft the "retainer" agreement. Van Kampen did not return to work and claims that this, plus outstanding salary arrears of \$4,000, amounted to constructive dismissal under section 66 of the *Act*.

SUBMISSIONS

Gateway

Gateway submitted that the company was clear in saying that it could no longer afford to employ anyone after June 1998. Gateway allowed the terminated employees to use the office facilities for their own purposes.

Gateway maintains Van Kampen did not have an employment agreement during the disputed period, did not attend the office full time, was working solely on contracts and was paid only when money from those projects came in. The main contract he worked on was the Ministry of Environment, Lands and Parks contract (MELP). Gateway also maintained that Van Kampen worked for other people and in other locations, during this time.

Gateway maintains that any work Van Kampen performed at the Gateway offices, other than on specified contracts, was volunteer labour in the hopes that future work might develop through the company. Gateway paid Van Kampen \$3,000 per month during this time out of empathy and in hopes that the company would be able to offer future employment. Harper claims that Van Kampen entered into contracts that were not consistent with his employment status prior to termination.

Gateway maintains that any money owing to Van Kampen is for contract work and does not exceed \$1,237.50.

Van Kampen

Van Kampen claims that Harper asked him to continue coming to the office to "keep the doors open." He claims Gateway continued his employment on a month to month basis and that his duties were the same as before: to maintain the email system, maintain the company's computers, perform software testing, compose software documentation, do whatever scanning work came in (which included work for BC Ferries Corp., BC Transplant Society, Kaiser Permanente and the District of Central Saanich as well as the MELP contract, advise on contract bids, answer telephones, send faxes, take papers to recycling and perform all other day-to-day functions necessary to the smooth operation of the company.

Martin McLeod, Manager, Systems Development and Research for Gateway from February 1, 1997 to January 31, 1999, and Calvin Lee who held executive positions with Gateway, gave evidence supporting Van Kampen's description of his duties during the disputed period.

Concerning the suggestion that he did not attend the office full time, Van Kampen claims that he took time in lieu of overtime, an accepted practice as reflected in the overtime provision of the June 1999 contract. He also worked with Gil Parker for a couple of days setting up his new computer. Other than for a few occasions, he attended the office daily.

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.

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.

Van Kampen submitted that during the term of his employment from July 1998 through May 31, 2000, he was owed \$80,000, less \$3,000 for unpaid leave in April and May 2000. He was paid \$75,000.18, leaving a balance owing of \$1,999.82, plus accrued interest.

REASONS AND DECISION

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, Van Kampen was an employee, not a contractor, for the following reasons:

The preponderance of evidence supports Van Kampen's submission of the duties he performed after June 1998 and that he attended the Gateway offices on a daily basis. This evidence included the testimony of Lee and McLeod, the contract signed June 1, 1999 referring the salary owed and overtime accumulated, and the testimony of Wallace concerning the salary accruals.

Gateway acknowledged that Van Kampen worked on at least one project during the disputed period. I find no evidence to support a suggestion that he contracted directly with the Ministry or other client for this project. Clearly, he was providing the services to Gateway. There is

evidence that Gateway entered into contracts of engagement during this time, but there is no such contract for Van Kampen.

I find there is no substance to Gateway's submission that Van Kampen was a contractor or that he provided services voluntarily. I find that he attended the offices as a full time employee, with some reasonable absences, and that he was entitled to receive a salary of \$3,000 per month during the disputed period.

The Director outlined the common tests for determining employment status. I agree that these tests support the conclusion that Van Kampen was an employee.

Salary Arrears

Gateway provided little evidence or submissions on this point. Van Kampen submitted compelling evidence that he was owed \$1,999.82 in wages at the time the employment terminated. I accept that figure.

Vacation Pay

Gateway's argument against vacation pay was predicated on a finding that Van Kampen was not an employee. I have determined he was an employee and I accept the Director's determination of vacation pay owing, \$2,460.00.

Compensation for length of service – Constructive Dismissal

Section 66 of the *Act* provides:

If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

1. Proposed changes to the contract

The Director observed that the changes Gateway was proposing to Van Kampen's employment might have triggered section 66. However, given that the changes had neither been finalized nor implemented, the Director found there had been no substantial alteration to a condition of employment.

I agree with the Director's determination. If Van Kampen had simply declined to accept the new conditions, Gateway would have had to decide on its course of action. That could have been proper termination notice. Van Kampen has failed to demonstrate that the Director erred in this finding.

2. Salary Arrears

The Director noted that Van Kampen had “somewhat belatedly claimed that the fact of Gateway not paying him on a regular basis is a substantial change triggering Section 66.” It is apparent that the Director did not accept this late submission. My reading of the Director’s determination is that she did not rule on whether salary arrears would or could constitute a triggering event.

Section 1 of the *Act* provides:

“conditions of employment” means all matters and circumstances that in any way affect the employment relationship of employers and employees.

Section 4 of the *Act* provides:

The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

Section 17 of the *Act* provides:

(1) At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

This is not an issue that the Tribunal has considered often.

In *Dianna Lucas*, BC EST #D171/00, Adjudicator Thornicroft considered a submission to invoke section 66 where it appeared that the employer may have underpaid an employee by \$1.00 per hour, for a portion of the wages due. The employee conceded that the amount was a comparatively small sum. Thornicroft quoted from the B.C. Court of Appeal decision in *Poole v. Tomenson Saunders Whitehead Ltd.* (1987), 43 D.L.R. (4th) 56, at page 64:

The non-payment of a relatively minor portion of the consideration to be paid for services which are to be performed over a prolonged time period, would not by itself, usually meet such criteria and hence would not qualify as a fundamental breach. Damages could be expected to afford a complete remedy.

Thornicroft observed that the employee had not raised the issue in her claim or during the investigation at the Employment Standards Branch and did not raise it in the appeal documents at the Tribunal. He states:

Obviously, this was not a significant issue insofar as Ms. Lucas was concerned. Accordingly, it hardly seems appropriate to characterize this underpayment as a fundamental breach going to the very root of her employment contract.

In *Superior Parking Ltd.*, BC EST #D507/00, Adjudicator Thornicroft again considered whether an employee could treat non payment of wages as a section 66 triggering event. As I read that decision, the employer had assumed the employee was intending to forego wages whereas the employee assumed that he had deferred payment while the employer attempted to turn the business around. The employee resigned when he understood that the employer did not intend to pay the deferred wages.

Thornicroft noted that even if the agreement had been to forego wages, that agreement would have been void by virtue of section 4. He found that the Director had not erred by finding that the employee's resignation was a constructive dismissal as defined in section 66.

In the case of Gateway, it is apparent that the business had been suffering financially for at couple of years. The history of the company, as evidenced by the June 1, 1999 contract, was one of late payment. I do not mean to imply that this acceptable. It is simply a fact of the financial life of this company. For over a year, Van Kampen continued to work knowing that his salary would be paid only when Gateway was paid by clients. Regardless, he was entitled to be paid on time, in accordance with section 17 of the *Act*.

Clearly, Gateway was in breach of the section 17 requirement and in breach of the implied term of the contract that wages will be paid. Does that entitle Van Kampen to invoke section 66 to claim additional wages in lieu of notice?

The evidence supports a conclusion that Gateway intended to pay the arrears. If Van Kampen had not resigned, he would have been entitled to receive notice and wages during the notice period. It is likely that the parties would have disagreed about the length of the notice period, but that dispute would have arisen against a different backdrop.

In fact, the reason Van Kampen resigned was that he was not agreeable to the changes being proposed by Gateway. He had a history of accepting late payment and, although this is not determinative, it is indicative that he did not consider it to be a fundamental breach of the contract. It is not my intention to understate or undermine the importance of timely payment. But, to borrow from the reasoning of Adjudicator Thornicroft in the *Lucas* case, it hardly seems appropriate to characterize the lack of timely payments, or the instance of arrears in June 2000, in this case as a fundamental breach going to the very root of this employment contract.

I find that Van Kampen has not substantiated his claim for 6 weeks wages in lieu of notice.

ORDER

Pursuant to section 115, I vary the Determination dated February 16, 2001 as follows:

Regular wages	\$ 1,999.82
Vacation pay	<u>\$ 2,460.00</u>
Sub total	\$ 4,459.82

I Order that Gateway File Systems Inc. pay the sum of \$4,459.82, plus interest pursuant to section 88, to Herbert Van Kampen.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal