An appeal

\- by -

Canstock Information Services Corp.
(“Canstock”)

\- 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:	David B. Stevenson
FILE No.:	2001/538
DATE OF HEARING:	September 14, 2001
DATE OF DECISION:	October 19, 2001

DECISION

APPEARANCES:

on behalf of CanStock International Services Corp.	David Napper Albert Budai
on behalf of the individual	No one appearing
on behalf of the Director	Shelley Burchnall

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by CanStock International Services Corp.("CanStock") of a Determination that was issued on June 28, 2000 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that CanStock had contravened Part 3, Section 18 and Part 7, Section 63 of the *Act* in respect of the employment of Carrie-Anne Jones ("Jones") and ordered CanStock to cease contravening and to comply with the *Act* and to pay an amount of $6,936.04.

Jones had complained that CanStock had failed to pay her wages owed for the month of November, 2000 and had been dismissed effective November 30, 2000 without notice or compensation in lieu of notice.

CanStock says the Determination was wrong in its conclusion because Jones was not an employee of CanStock for the purposes of the *Act* and, even accepting Jones was an employee under the *Act*, CanStock says the calculation of the amount owed to Jones is wrong.

CanStock has also raised a preliminary concern that it was not properly notified of the complaint. In the appeal, CanStock states:

> We are in receipt of a copy of the appended letter of Determination dated June 28, 2001 and are quite astounded. This is the first time a letter has been addressed by the Employment Standards Branch to CanStock International Services Corp. (hereinafter referred to as "CanStock") at our business address or our registered office, . . .
>
> We hold that, as the company which is listed as being the employer, has never been properly notified of this matter at either its registered or business addresses, and has never been heard on the issues, the Letter of Determination is flawed and should be overturned.

I shall address this matter by reference to the Determination and submission of the Director. The Determination sets out the following:

> A registered letter was sent to Mr. Budai at Canstock [sic] on January 31, 2001, outlining the complaint filed by Ms. Jones. A response was requested by February 15, 2001.
>
> The letter was returned by Canada Post marked "unclaimed", March 5, 2001.
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> On March 12, 2001, I left a telephone message with the secretary at Canstock [sic] for Mr. Budai to contact me. He did not return the call.
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> On March 12, 2001 another registered letter including a Demand for Payroll records was sent to Mr. Budai. A response was requested by March 26, 2001.
>
> The letter was returned by Canada Post marked "unclaimed", April 17, 2001.
>
> On April 17th, 20th, 27th and May 10th, 2001, I left telephone messages with the secretary at Canstock [sic] requesting Mr. Budai to contact me regarding the complaint filed by Ms. Jones. He did not return the calls.
>
> Despite numerous attempts to contact the employer by telephone and written correspondence, no response was ever received.

In the submission of the Director, it states:

> There are several reasons why the correspondence was sent to 848 Green Acres Road, ... This was the address listed on Ms. Jones' Complaint and Information Form as the <u>mailing</u> address for the employer. In addition, this address matched the primary address used in an Employment Standards investigation of allegations against CanStock in 1999.

I also note that while the business address for CanStock may have changed, the address to which the correspondence was sent was, and continues to be, the residential address for Mr. Budai, the sole director and officer, and the principal, of CanStock. That correspondence was unclaimed. The telephones calls were ignored. Mr. Budai has attempted to explain his failure to respond to communications from the Director by alleging he was under a "state of siege" from Jones, which included, he alleged, Jones having left a Kamloops telephone number that was "call-forwarded" to her home in Maple Ridge. The explanations given by Mr. Budai in his submissions and his evidence for ignoring the communications and telephone calls from the Director are unproven and entirely unsatisfactory. I also note that during the same period of time that Mr. Budai was ignoring the communications of the Director, he was actively communicating with a representative of Canada Customs and Revenue Agency concerning an unemployment insurance claim filed by Jones, filing an appeal of a CCRA decision finding Jones to be an employee under

federal tax, unemployment insurance and pension legislation, with the RCMP and with VISA concerning an alleged claim filed by Jones. Finally, it would have been a simple thing for Mr. Budai to have made a single call to confirm the legitimacy of the messages left by the Branch or, having retained the services of a private investigator, to have had that individual check the legitimacy of the number provided.

CanStock cannot be heard to say they were unaware of the complaint. They were adequately notified of the complaint. Nor can they complain that correspondence was directed to Mr. Budai's personal address, rather than to the company's business address. As CanStock stated in the confidential summary provided to the Tribunal with their appeal, "Al Budai is synonymous with the CanStock name". Even if the Director did not direct correspondence to CanStock's office, all of the efforts at communication were directed to Mr. Budai. There is no requirement in the *Act* that communications from the Branch be directed only to the business address or registered and records office of a corporation. Their suggestion that communicating to the address of the sole Director/Officer and sole guiding force of CanStock is not communicating with CanStock is technical in the extreme and is rejected.

ISSUE

The issue in this case is whether CanStock has shown the conclusion that Jones was an employee was wrong and, if she was an employee, whether the calculation of the amount owed to her was incorrect.

THE FACTS

The Determination sets out the allegations and background to the complaint:

> CanStock is a publisher of investment (stock market) newsletters, which is under the jurisdiction of the Act. A company search revealed CanStock is listed with the Corporate Registry. Mr. Albert S. Budai is listed as the sole Director/Officer.
>
> Ms. Jones worked for CanStock from July, 1996 to November 30, 2000 as an internet researcher. She had a regular work week of Monday through Friday, eight hours per day, forty hours per week. Ms. Jones was paid a salary in the amount of $1750.00 (net) semi-monthly. Her wages were directly deposited into her bank account by Mr. Budai on the 15th and last day of each month.

The conclusions of fact reached by the Director were based on information provided by Jones, as CanStock did not respond to requests from the Director to reply.

CanStock called two witnesses, Mr. Hugh Greene and Mr. Budai. Jones did not attend the hearing. At one point, she had made arrangements to attend by teleconference, but she cancelled those arrangements the day before the hearing was scheduled. She was notified by the Tribunal

of the potential consequence of her failure to attend. The Director's representative did not call any evidence and took very little part in the hearing, not surprising since she had not heard any of the information being provided by CanStock and had not previously seen any of the documents submitted by them. Her role was limited to explaining how some of the communications came to be delivered to Mr. Budai's residence and to identifying the basis for the Determination.

CanStock appeared with several binders of material which the Tribunal was invited to review. It should be apparent from the above facts that none of this material had been provided during the investigation. While CanStock did provide some material with the appeal, it was nowhere close to the amount of material that was placed on the table at the commencement of the hearing. Only one copy of the material was available. CanStock was advised of the nature of the appeal process and, more specifically, was told the appeal process was not a re-investigation of the complaint but a hearing to determine whether the Director had erred in the Determination. To that end, CanStock was invited to make reference to any document in their binders that went to their appeal and was asked to identify and copy such document for the Tribunal and the Director's representative at the hearing. Reference to some documents was made and copies of those documents were provided at the hearing. Other documents were unavailable at the hearing and were provided to the Director and the Tribunal later.

Mr. Greene identified himself as a private investigator with Silverfox Investigations Ltd., who was retained by CanStock in late October, 2000. While Mr. Greene's evidence was interesting, it shed very little light on the issue before me. Much of it was hearsay or speculative. I will note one point of his evidence: he said that about the same time as he was retained by CanStock, he advised Mr. Budai to stop making any payments to Jones. This advice was based on information provided to him by Mr. Budai. Notwithstanding that advice, the evidence showed Mr. Budai (or CanStock) made some payments to Jones in November, 2000, including a payment of $325.00 on or about November 15, 2000 and a payment of $6000.00 into Jones' savings account on or about November 9, 2000.

Mr. Budai did not dispute that Jones first began working for CanStock in July, 1996 and that she was "put on the payroll" in May, 1997. A copy of the 1997 Payroll Summary for Carrie Jones, covering a period from May 1, 1997 to December 31, 1997, and a copy of a T4 issued December 31, 1997, were produced. I note that the T4 indicates Jones' first day worked was May 31, 1997 and shows the reason for issuing the T4 as "A", which indicates a shortage of work.

Mr. Budai said there was no specific job description for Jones, but there was a general verbal agreement that Jones would carry out internet marketing for CanStock, which included "selling" CanStock and soliciting subscribers for CanStock's financial newsletters on the internet. Mr. Budai says that while Jones only remained on the payroll for seven months during 1997, she continued to do internet marketing for him on a contract basis until May, 2000, when Mr. Budai says he terminated her services. In support of that assertion, CanStock submitted the text of an

e-mail communication alleged to have taken place between Jones and him on May 19, 2000. The relevant portion of that communication read:

> NOTICE OF TERMINATION OF SUBCONTRACT
>
> Your $2000 monthly contract with CanStock Information Services Corp. is terminated immediately for a multitude of reasons, including your unwillingness to supply a copy of the mortgage documents relating to the "Maple Ridge house", your recent inability to provide any stock market research of use to my company, your unwillingness to travel to Kamloops, B.C. to attend our monthly staff meetings.

The reply from Jones was also included. In that reply, she says the arrangement between her and CanStock was that she would receive $3500 a month and suggests that arrangement was reached with CanStock in early 1998.

Mr. Budai also submitted the texts of two other e-mail discussions which he testified occurred between Jones and him on September 3 and 4, 2000 and October 19 and 20, 2000. The former contained the following statement which is indicated to be from Mr. Budai:

> Nicole and I talked and decided that your classification as a subcontract for 1998, 1999 and so far this year should be unchanged. Then very soon I can put you on the payroll for my accounting practice. We also thought that the regular $3500 deposited each month . . . the split would be $2000 for [Jones] and $1500 for Peter.

The latter contained the following statement indicated to be from Mr. Budai:

> Question: If I write a statement by e-mail and by fax (signed by me) stating that I will pay off the credit cards and the second mortgage by December 31, 2000, will YOU write and sign a statement effectively saying that you admit to being a subcontract and that has been the case since 1998.?
>
> Think about it ..... I am offering to pay off your headaches at the latest in 69 days ? It will give me enough time to raise the money and then you and I can part company FOREVER. That would make ya real happy eh.
>
> Hey Have a Great Night .... AL

The evidence also indicated, consistent with the statement in the former communication, that until mid-November, 2000, Jones regularly received at least $3500 a month, paid semi-monthly, from CanStock. The Determination also included a letter dated September 30, 1998, issued by Mr. Budai. "To Whom it May Concern". The letter states, *inter alia*, that Jones was being paid "net take-home pay" of $3,500 per month.

Mr. Budai testified that Jones had not performed any work for CanStock after May, 2000, adding that while Jones worked for CanStock she had complete autonomy in respect of how and when she did work for CanStock. She never provided any receipts to CanStock for the work she did, she bore all the expenses related to the work being done and she alone had the chance of profit and risk of loss. It was apparent from the evidence, however, that CanStock paid for all the expenses incurred by Jones in carrying out that service.

ARGUMENT AND ANALYSIS

CanStock, as the appellant, has the burden in this appeal of persuading the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. This burden has been described by the Tribunal in *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96) as the "risk of non-persuasion":

> Rules about the legal burden, called by Wigmore "the risk of non-persuasion", define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, "How to Approach the Burden of Proof and Presumptions" (1952-53) 25 Rocky Mountain L.Rev. 34 puts it, "the allocation (of the burden of proof) is determined according to considerations of fairness, convenience and policy". In most cases, convenience suggests that the party with the most ready access to the means of proof should have to produce it. One of the goals of proof is the production of reasonably accurate information and therefore there should be an obligation on the party having most access to such information to provide it or bear the risk of non-persuasion. Considerations of fairness suggest also that the party seeking change should bear the risk of non persuasion in that the status quo would otherwise prevail. Of course concerns of convenience and fairness may be affected by particular circumstance and, for example, may depend upon an assessment of the respective resources of the parties. Ultimately the notion of "burden of proof" is only of significance where the tribunal has not been persuaded.

Placing the risk of non-persuasion on an appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director or to require the Director and the individual to re-establish the validity of the claim. As I advised the parties at the outset of the hearing, an appeal is not a re-investigation of the complaint where it is open to the Tribunal to substitute its opinion on the merits of the complaint for that of the Director without the appellant showing an error in the Determination sufficient to persuade the Tribunal it ought to be varied or cancelled.

Where it is only a conclusion of fact that is being challenged, the appellant must show that the conclusion of fact was based on wrong information, that it was manifestly unfair or that there was no rational basis upon which the findings of fact could be made (see *Mykonos Taverna, operating as the Achillion Restaurant*, BC EST #D576/98).

It should be reiterated at this juncture that the burden in this appeal is not on Jones to reprove her complaint, but on CanStock to demonstrate an error or some basis for the Tribunal to vary or cancel the Determination. The application of that burden in the face of non-attendance by a respondent was discussed by the Tribunal in *Director of Employment Standards*, BC EST #D051/98 (Reconsideration of BC EST #D448/97):

> The nature of the burden on appeal was discussed in the case of *John Ladd's Imported Motor Car Co,* BC EST #D313/96. In this case the Adjudicator held that if the factual underpinnings of the Determination are in issue an oral hearing might be granted. The form of the hearing may take the form of a hearing de novo where the facts are disputed or the credibility of a witness is in issue. The Determination forms the basis of the hearing and frames the issues in dispute. The burden rests with the appellant. The form is more akin to a true appeal, but it has some characteristics of a hearing de novo.
>
> The non-attendance of a party [or, as in this case, a particular witness] does not change the onus, which remains on the appellant to demonstrate error or a basis for the Tribunal to vary, cancel or confirm a Determination. As a matter of evidence, however, a non-attending party takes the risk that the attending party will tender sufficient and weighty evidence for the appellant to have met its tactical burden to persuade an Adjudicator to vary or cancel a Determination. A party who fails to appear at a hearing does take a risk that information or evidence helpful to the Adjudicator may not be available to the Adjudicator. This proposition applies equally to an Employer, an Employee or the Director's delegate. In the case of an appellant, non-attendance is generally fatal to an appeal. In the case of any other party, the non-attendance may or may not be fatal, depending on the circumstances of the case, the issues on appeal and whether the appellant meets the persuasive or tactical burden.

Some of the evidence suggests the relationship between Jones and Mr. Budai transcended the usual employer/employee arrangement. Whether those matters were tinged with criminal conduct I leave to those authorities who have jurisdiction to consider that question. I do not find any of those other matters impact on what I must decide, which is whether CanStock has met the burden of persuading me that the Director was wrong in finding Jones was, for the purposes of the *Act*, an employee of CanStock from July, 1996 until November 30, 2000 and was entitled to unpaid wages and length of service compensation under the *Act*.

CanStock has failed to meet their burden. I was unimpressed by the evidence given by Mr. Budai. I do not accept that CanStock, through Mr. Budai, terminated the relationship with Jones in May of 2000. It defies logic that CanStock, while professing to have ended the "subcontract" of Jones in May, 2000, continued to regularly pay her amounts of $3500 a month until the end of October, 2000. The Director found that the regular deposits made by CanStock was payment of wages for the performance of work. Nothing in the evidence provided by CanStock has persuaded me that finding was wrong, unreasonable or without rational foundation. The communications attributed to Mr. Budai in September and October, 2000, also referred to the continuing nature of an active "subcontract" relationship. What is noticeably absent in those communications is any suggestion that Jones is getting paid for doing nothing. The vague allegations of fraud and extortion have not provided a reasonable explanation for the continued regular payment of $3500 a month or the content of those communications. It was also evident that CanStock was continuing to pay Jones for any expenses she incurred while doing internet marketing. Mr. Budai testified extensively about how he made all of the payments on the credit card accounts used by Jones. There is also the following reference in the September 3, 2000 e-mail communication from Mr. Budai to Jones:

> I pay your credit card bills (personal items too) yet I never hear a word of appreciation. Lets remember that I am not the one who drew down your credit cards . . .

And in the October 20, 2000 e-mail communication, Mr. Budai is indicated as asking:

> Question : When will you send me the latest credit card statements ? If you lied about promising to send them to me, then admit you lied.

As I indicated above, if the transcripts of the e-mail communications presented in evidence are true, they speak of a relationship between Jones and Mr. Budai that goes beyond what one would normally find in a typical employment relationship. However, the possibility there may have been a broader relationship outside that of employer/employee does not minimize the legitimacy of the conclusion reached in the Determination that Jones was an employee and was entitled to be paid wages earned as an employee and to be paid length of service compensation upon termination of that employment.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated June 28, 2001 be confirmed in the amount of $6,936.04, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal