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 -

Dwight Stirrett, Operating as Fortune Financial Corporation
("Stirrett")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 97/751

DATE OF HEARING: December 17, 1997

DATE OF DECISION: January 14, 1998

DECISION

APPEARANCES

for the Appellant:	Dwight Stirrett
for the individual:	in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Dwight Stirrett, operating as Fortune Financial Corporation ("Stirrett") of a Determination of a delegate of the Director of Employments Standards (the "Director") dated September 19, 1997. In that Determination, the Director concluded Stirrett had contravened Sections 16, 17, 18, 27, 28, 40, 45 and 58 of the *Act* and ordered Stirrett to cease contravening the *Act* and to pay an amount of $1931.56 in respect of the employment of Melaney Phillips ("Phillips").

Stirrett says the Director erred when she concluded Phillips was an employee of his business.

ISSUE TO BE DECIDED

The sole issue to be decided is whether Phillips was an employee of Stirrett.

FACTS

Stirrett is the Manager/Operator of the Kelowna branch of Fortune Financial Corporation ("Fortune"), a national organization providing financial planning services. He also manages three other branches in the South Okanagan. As part of his agreement with Fortune, he is deemed to be an "independent contractor" and is responsible for the operation of, and the costs associated with, the Kelowna branch. The arrangement was described in evidence as being similar to a franchise agreement.

Phillips had been employed in Ontario as a mutual fund representative before returning to British Columbia in 1996. Wishing to pursue a financial planning career in this province, she solicited a number of financial planning firms, seeking to establish an association with one of them, a necessary step to obtaining a licence to sell securities in this province. Stirrett responded to her resume and there were two meetings in May, 1996, resulting in Stirrett inviting Phillips to "associate" with him. The terms of the relationship were left

vague, principally because there was no specific work for her to do and no defined job available. The relationship was created because Stirrett was impressed with the material provided by Phillips during their meetings and wanted to see if she "had the right stuff" to be of value to him in his business. The relationship commenced on June 19, 1996 and ended on September 11, 1996.

On June 20, 1996, Stirrett and Phillips signed a "Confidential Disclosure Agreement". It is not necessary to set out the complete agreement, only that the agreement says, on its face, that Phillips was going to render some service to Stirrett and Stirrett was going to disclose to Phillips his marketing systems and techniques and his client and prospect base for the purpose of allowing her to render those services.

Phillips did perform some services for Stirrett, which included editing and retyping a financial planning strategy booklet and several direct marketing reports, preparing a spaced repetition mailing list and mail out strategy, making appointments for Stirrett with prospective clients, preparing mailings for a number of financial planning seminars, participating in a telephone campaign to invite or confirm attendance at those seminars, attending those seminars, assisting in assembling and handing out material on behalf of Stirrett at the seminars, greeting guests, collecting response cards and doing some follow-up on the responses. The services she actually performed during the "association" were not significantly different than the tasks and duties outlined for her to perform in a proposal to formalize the relationship made by Stirrett to her on August 12, 1996.

Phillips attended the office regularly and kept regular hours of attendance. In July and August, 1996 Stirrett and Phillips attempted to discuss and establish a compensation formula for Phillips. They were not able to do so before September 11. The stumbling block between them seemed to be whether Phillips would be paid straight commission, as Stirrett proposed, or some combination of hourly rate and commission, as Phillips wished. During the relationship, Phillips was paid $1800.00 as an advance on earnings.

Phillips was able to acquire, through Fortune Financial Corporation, business cards that identified her as "Sales Assistant to Dwight Stirrett" and similarly identified herself in the letterhead of any correspondence she produced. While Stirrett may not have directly authorized the acquisition of the business cards or even the use of the title on the letterhead of the correspondence sent by Phillips, I simply do not accept he was unaware she had the cards and that she held herself out, on the cards and generally, as his "sales assistant".

ANALYSIS

It may be helpful to the analysis that follows to reiterate for the benefit of both parties that the *Act* establishes minimum standards of conditions of employment in this province.

The *Act* prohibits any person contracting out of those minimum requirements. Section 4 of the *Act* says:

> 4. 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.

Stirrett says that Phillips agreed to work for free until a contract was agreed upon and since no contract was agreed upon, he is not required to pay her anything. If Phillips is found to be an employee, then Stirrett is wrong on that point. The *Act* requires that employees be paid wages for work performed and that requirement cannot be avoided, even by an agreement between the employer and the employee.

The definition of employee in the *Act* is inclusive, and says:

> **"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;

In this appeal, the definitions of "employer", "wages" and "work" are also relevant:

> **"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.

"wages" includes

(a) salaries, commissions, or money, paid or payable by an employer to an employee for work,

(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,

(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,

(d) money required to be paid in accordance with a determination or an order of the tribunal, and

(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefits, to a fund, insurer or other person,

but does not include

(f) gratuities,

(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,

(h) allowances or expenses, and

(I) penalties.

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

The Courts and the Tribunal have accepted these definitions must be given a liberal interpretation: **Larry Leuven -and- Director of Employment Standards**, BC EST #D136/96.

There are a number of arguments made in this appeal that are answered by those definitions. First, the *Act* does not require that a person to be specifically instructed to

perform work before the definition of "employee" is satisfied. It is sufficient, to meet the definition, that an employer allows, directly or indirectly, a person to perform work normally performed by an employee. Stirrett argued that the services performed by Phillips should not be considered when determining the issue of her status because she was not "instructed" to perform them by him, but rather they had resulted from suggestions made by Phillips. The evidence indicated that the work done by Phillips consisted, for the most part, of assisting in areas of responsibility of other employees, principally Caroline Maata, Stirrett's personal assistant. She was not only allowed to do that, but, in most cases, encouraged to get involved in helping to develop Stirrett's business and to organize his schedule.

Second, a person can be considered an employee under the *Act* even though that person may be compensated on a straight commission basis. The method by which a person receives compensation for work performed does not determine their status under the *Act*. The *Act* considers commission to be wages if it is received by an employee. Stirrett argued Phillips should not be considered an employee because she would have been compensated on a straight commission basis. In the absence of other criteria pointing to the conclusion the person is an independent contractor rather than an employee, payment of compensation to that person for the services performed on a commission basis is a neutral factor.

Third, the question of whether a person is an employee is one which is based on an assessment of the relationship of the parties, not on the unilateral intent of one of them. Stirrett argued he had no intention of creating an employer/employee relationship with Phillips. His intention is irrelevant if, in fact, such a relationship was created. Some of the evidence indicated it was Phillips' intention to establish an employment relationship. In July, 1996 she prepared an "Application for Employment" form to be signed by Stirrett and attached to her application for transfer of her licence. She was required on the transfer application form to attest to the truthfulness and accuracy of the information. She also testified, in response to questioning from Stirrett, that she felt she was an employee. I conclude from the evidence there was no agreement between Stirrett and Phillips on what form their relationship would take. Where there is no meeting of the minds on the nature of the relationship, it is the work performed and whether the circumstances in which the work is performed are consistent with the existence of an employer/employee relationship that will be addressed, and not what the relationship was intended by one party to be.

On the facts, I conclude Phillips was an employee for the purposes of the *Act*. I reach this conclusion for the following reasons:

Phillips performed work normally performed by an employee,

Stirrett controlled the work she did; the principal reason for entering into the "Confidential Disclosure Agreement" was to enable Stirrett to continue to retain exclusive control over that work,

Phillips was integrated into Stirrett's business; she was allowed to hold herself out as "Sales Assistant to Dwight Stirrett",

Phillips had no chance for profit nor any risk of loss,

Stirrett owned or controlled the "tools" used by Phillips in performing the work, and

there was no meeting of the minds on whether the relationship was one of employer/employee or contractor/independent.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination of the Director, dated September 19, 1997, be confirmed in the amount of $1931.56 together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

.....
David Stevenson
Adjudicator
Employment Standards Tribunal