

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 -

Terry Gregson
("operating as G&G Music")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 98/778

DATE OF DECISION: February 2, 1999

DECISION

OVERVIEW

This is an appeal by Terry Gregson operating as G&G Music (“G&G”), under Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination which was issued on December 1, 1998 by a delegate of the Director of Employment Standards (“Director”).

The Determination required G&G to pay \$713.40 to William C. Miller on account of statutory holiday pay according to Section 45 of the *Act* and accrued interest.

G&G appeals the Determination on the ground that “...William Miller was a private lesson music teacher with our company and under contract, not as an employee”.

This appeal proceeded by way of written submissions from the parties.

ISSUE TO BE DECIDED

Did the Director err in determining that G&G is required to pay statutory holiday pay to William Miller under Section 45 of the *Act*?

FACTS

G&G operates a music store and offers music instruction in Maple Ridge, BC.

There is no dispute about the fact that Mr. Miller was not paid statutory holiday pay. G&G gives two principal reasons for this non-payment: Mr. Miller was a contractor rather than an employee; and, the method by which music teachers are compensated is tied closely to the method by which students pay instruction fees.

Mr. Miller taught music lessons at G&G from September, 1996 to August, 1998. He was also employed in the security business and operated his own music recording studio.

G&G pays its teachers according to an hourly wage schedule which is based on three factors: the amount of fees a student pays; whether a teacher holds a music degree or not; and, the number of months of “continuous service” which the teacher has at G&G. This “Teacher Compensation Schedule” notes that:

“Violations of Learning Center policy and procedures can cause delay in step increases.

Pay is based on hours actually taught (piece work) from a minimum of 1/2 hour pay.”

Teachers’ instruction schedules depend on students’ availability and vary over time. A teacher is not paid if a student cancels a lesson.

Mr. Miller did not work on any statutory holiday while teaching at G&G but, as noted above, he did not receive any statutory holiday pay. He received bi-weekly payments which included an explanation of gross earnings and deductions for each “pay period ending...” UIC, CPP and Income Tax were deducted from his gross earnings on each bi-weekly cheque.

The Determination contains the following, at page 2:

Finding and Analysis

The employer failed to respond to correspondence or produce payroll records although required to do so by the *Employment Standards Act*. The employer has acknowledged it did not pay for statutory holidays but has failed to participate in this investigation by providing records. In the absence of any evidence to the contrary, I accept the position of the complainant (Mr. Miller) regarding his allegation for statutory holiday pay.

Conclusion:

I have determined that **William C. Miller** is entitled to statutory holiday pay and interest in the amount of **\$713.40** as outlined on the attached calculation sheet. The complainant has supplied payslips that appear to be issued every two weeks. I have used the two payslips that were issued prior to the statutory holiday for determining the amount owed for each statutory holiday. Where no payslips were provided no calculation was completed.

Mr. Miller’s statement of earnings dated January 31, 1998 contained the following note:

- 1) Vacation Pay Rate: 4% of gross
- 2) Unfortunately our system does not print out accumulative figures:
1998: \$1086.08 Gross Wages

Accumulated Vacation Pay to date: \$111.48
(Nov 8/97 - Last paid Vacation pay)

3) Hopefully T4's for 1997 will be ready in 2 weeks.

ANALYSIS

Before turning to an analysis of the requirement to pay statutory holiday pay, I will deal briefly with the issue of whether Mr. Miller was a contractor, as alleged by G&G, or an "employee" for purposes of the *Act*.

G&G's appeal has not raised any substantive ground on which I could find that Mr. Miller was not an "employee" between September, 1996 and August, 1998. The *Act* contains a broad definition of "employee" in Section 1(1) which includes:

- a) a person ... receiving or entitled to wages for work performed,
- b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- c)

There is no dispute that Mr. Miller received wages from which CPP, UIC and Income Tax deductions were taken and remitted by G&G. He also received vacation pay and was issued T4 statements as required by the *Income Tax Act*.

Neither the fact that Mr. Miller's instructional hours were not regular nor G&G's "teacher compensation schedule" detract from my finding that Mr. Miller was an employee for purposes of the *Act*.

Part 5 of the *Act* establishes an employee's entitlement to statutory Holiday Pay. Section 45 states:

- 45. An employee who is given a day off on a statutory holiday or instead of a statutory holiday must be paid the following amount for the day off:
 - (a) if the employee has a regular schedule of hours and the employee has worked or earned wages for at least 15 of the last 30 days before the statutory holiday, the same amount as if the employee had worked regular hours on the day off;
 - (b) in any other case, an amount calculated in accordance with the regulations.

Section 24 of the *Employment Standards Regulation* (BC Reg. 396/95) states:

- 24. For the purposes of section 45 (b) of the *Act*, statutory holiday pay is calculated as follows:

- (a) for an employee who does not have a regular schedule of hours and who has worked at least 15 of the last 30 days before a statutory holiday, by dividing the employee's total wages, excluding overtime wages, for the 30 day period by the number of days worked;
- (b) for an employee who has worked less than 15 of the last 30 days before a statutory holiday, by dividing the employee's total wages, excluding overtime wages, for the 30 day period by 15.

The Determination contains a calculation schedule which shows the basis on which the Director calculated Mr. Miller's entitlement to statutory holiday pay. G&G has not made any submission which seeks to challenge the Director's calculation methods.

ORDER

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

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC/lb