

**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-

University of Victoria Students' Society  
("UVSS")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** C. L. Roberts

**FILE NO:** 1998/728

**DATE OF HEARING:** February 11, 1999

**DATE OF DECISION:** February 19, 1999

**APPEARANCES**

For the Director	R. Corrigan
For the University of Victoria Students' Society	Douglas Ausman, General Manager , Judy Guthrie, Support and Administration Divisional Manager
For Timothy McGuire	K. Sundberg I. Flemington, Chair, Board of Directors, 1996-97

**DECISION**

**OVERVIEW**

This is an appeal by the University of Victoria Students' Society ("UVSS"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against Determination #018-067, issued by the Director of Employment Standards ("the Director") October 30, 1998. The Director's delegate determined that UVSS had contravened Section 21(1) of the *Act* in offsetting commission wages owed to Timothy McGuire ("McGuire") without written consent to do so, and failed to pay him vacation pay contrary to Section 58 of the *Act*. UVSS was Ordered to pay \$3,943.89 to the Director on behalf of McGuire.

**ISSUES TO BE DECIDED**

The issue to be determined is whether McGuire was an employee of UVSS. This issue was not raised by UVSS at the time the Director's delegate investigated the complaint, and thus no finding was made on this point. Ms. Guthrie explained that she merely provided documents to the Director's delegate at his request, and that she was given no opportunity to explain the documents, or UVSS's position on McGuire's status.

Although the Tribunal has determined that it is not open for an Appellant to raise an issue on appeal which had not been raised initially with the Director, I accept in this case that UVSS was not given that opportunity. Nevertheless, when the Employment Standards Branch contacted UVSS regarding McGuire's complaint, UVSS ought to have turned its mind to the issue, and made an objection to the Director's jurisdiction at that time.

Although UVSS argued that McGuire had verbally agreed that UVSS could offset a court judgement against wages owing to him, both Ausman and Guthrie acknowledged that this agreement was not in writing. This ground of appeal was not pursued in the hearing.

**FACTS**

The following facts as set out by the Director's delegate were not disputed:

McGuire worked as Advertising Sales Coordinator for UVSS for a term period ending December 31, 1997. He was to receive a 30% commission on all ads sold and collected upon by December 31, 1997.

UVSS and another party were named as respondents in an action by McGuire. McGuire's petition was dismissed, and the two respondents were awarded costs. No further money was paid to him.

At the end of the term, UVSS withheld the balance of wages earned by McGuire, as the Director's delegate stated, "in apparent partial satisfaction of a judgement of the Court awarding costs against Mr. McGuire arising from a separate litigation involving Mr. McGuire and the UVSS."

The total commissions earned by McGuire was \$7,018.74. In June, McGuire received one cheque in the amount of \$3,553.64, leaving a balance of \$3,464.40 outstanding.

The Director's delegate determined that, in the absence of any express authorization, UVSS was not entitled to withhold wages. He determined that although the court order established McGuire's liability to UVSS, it did not constitute a written assignment of wages for the purposes of Section 21 of the *Act*.

The Director's delegate also found that McGuire was entitled to 4% vacation pay.

At the hearing, the following facts were also not disputed:

McGuire did not provide UVSS with a written assignment of wages nor expressly authorize any withholding of his commission.

The position of Advertising Sales Coordinator was included in the Collective Agreement between the UVSS and the United Steelworkers of America. Appendix 1 of that Agreement sets the rate of pay at 30% commission.

The position of Advertising Sales Coordinator was advertised in the Times Colonist. The advertisement stated that the position was a temporary unionized position. The advertisement also stated indicated that "duties included....any other duties assigned by the Division Manager...The UVSS is an equal opportunity employer."

The position was also posted on the union hiring board.

The position is no longer included in the Collective Agreement.

McGuire was provided with twenty four hour access to office space, copying facilities, a computer, fax machine, paper, a mail box, and a specific telephone number, which was printed on a business card produced for him by UVSS.

All advertising revenue collected was paid directly to UVSS.

Ms. Guthrie testified that she chaired the committee which hired McGuire for the position of Advertising Coordinator. She agreed that the committee followed the hiring process outlined in the Collective Agreement for all positions. She agreed that she was responsible for placing the advertisement for the position in the Times Colonist, and that she had "lifted" the wording in the advertisement from previous advertisements. She also agreed that a personnel file for McGuire had been created, and that throughout the 11 months, McGuire was referred to an employee.

**ARGUMENT**

The UVSS contended that the Determination was in error because McGuire was a self employed contractor, not an employee of UVSS.

In support of its argument, Mr. Ausman outlined the following factors:

- \* commissions were payable only on advertisements sold for the UVSS Handbook;
- \* no other amount was earned by McGuire;
- \* commission was paid only after ad revenue was collected;
- \* it was McGuire's responsibility to collect advertising revenue;
- \* all work was to be completed by certain deadlines, and no commissions would be payable for revenue collected after December 31;
- \* McGuire was not provided with dedicated office space or equipment at UVSS
- \* McGuire used his own vehicle and equipment at his own expense
- \* McGuire's days and hours of work were his own
- \* McGuire's compensation was dependent on his success in generating advertising revenue
- \* UVSS prepared neither a T4 slip nor a union card for McGuire
- \* McGuire's work was for a specific term, not a continuing arrangement
- \* McGuire was not directly supervised

Ausman stated that the UVSS at times, "in error and for administrative convenience", used the term employee when referring to McGuire or the handbook ad sales position. However, he contended that this error did not change the fact that McGuire was a self employed contractor.

Ausman contended that regardless of what McGuire or the position was referred to, the facts of the relationship were critical to the determination of whether McGuire was an employee or contractor.

McGuire contended that he was an employee, and identified the following factors in support of this argument:

- \* He was hired in accordance with the union hiring process established in the Collective agreement
- \* The position was contained in the Collective Agreement
- \* His remuneration was set out in the Collective Agreement
- \* UVSS provided him with a shared office and keys for after hours access, desk, computer, filing cabinet, telephone with personal voicemail, and UVSS business cards indicating his name and position
- \* UVSS established timelines regarding ad sales, and he was required to meet with Ms. Guthrie regularly to discuss his progress
- \* Guthrie had the ability to approve or reject all ad proposals
- \* UVSS determined the price structure for the ads and placement of ads in the handbook
- \* UVSS provided him with union benefits.

Mr. Flemington, whose position at UVSS was responsible for, among other things, producing publications, testified that the position was not intended to be a contract position.

**ANALYSIS**

Section 1 of the *Act* defines employee to include

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

An employer is defined as including 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.

Work is defined as meaning "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."

Wages are defined to include

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

Several common law tests have evolved to determine whether a person is an employee or an independent contractor. I have considered several of those tests, including the control test, along with the definitions noted above, and find that McGuire was an employee.

One of the common law tests, and the definition in the *Act*, centre on the issue of control or direction of an employee. The Control Test involves an examination of the degree of control, the ownership of tools, the chance of profit and the risk of loss.

McGuire provided virtually none of his own equipment. Apart from his own vehicle, all of his tools were provided by UVSS, although they might not have been specifically dedicated for his own use. UVSS required that he use a telephone number within the Communications department to receive telephone calls from advertisers.

McGuire did not assume a chance of profit and risk of loss. He received a commission based on advertisements sold. The rate of commission was established by a Collective agreement, not negotiated between the parties. The chance of profit was limited to 30% of the revenue for advertisements sold and collected.

How McGuire carried out his work was not completely autonomous. He had set deadlines, and his progress was reviewed regularly. UVSS determined which type of advertisements were acceptable for inclusion in the handbook.

McGuire did not share the risk that if no advertising was sold, UVSS would pursue him for costs associated with producing the Handbook. At most he would receive no commissions. This relationship does not suggest that McGuire took a risk. What McGuire had was an opportunity to earn money, the amount of which was dependent solely on the number of ads he sold and collected for.

Applying the economic reality test, I find that McGuire was in business for UVSS, not for himself.

As this Tribunal has stated in a previous decision, the common law tests of employment are subordinate to the statutory definition (*Christopher Sin*\_BCEST#D015/96). The statutory definition of employee contained in the *Act* is inclusive, not exhaustive.

Thus, the overriding test is whether McGuire "performed work normally performed by an employee," or "performed work for another." The Tribunal has held that the definition is to be broadly interpreted: ( *On Line Film Services Ltd v Director of Employment Standards BCESTD 319/97*).

Ms. Guthrie conceded that McGuire performed work which was substantively no different than that previously performed by a salaried, unionized employee filling the position of Advertising Sales Representative.

I find that McGuire received wages for services performed for UVSS, and thus falls within the definition of "employee." Consequently, I find that he is entitled to the protection of the *Act*.

Section 21 of the *Act* provides that an employer may not withhold any part of an employee's wages for any purpose, except as permitted or required by the *Act* or any other enactment of British Columbia or Canada.

Section 22 of the *Act* permits an employer to honour an employee's written assignment of wages to meet a credit obligation and requires that an employer must honour an employee's written assignment of wages for a number of defined purposes.

There is no dispute that UVSS did not have McGuire's written assignment of any wages. Consequently, I find no evidence to support the argument that the Determination is in error.

The appeal is dismissed.

**ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination, dated October 30, 1998 be confirmed, together with whatever interest may have accrued, pursuant to Section 88 of the Act, since the date of issuance.

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Carol Roberts  
Adjudicator  
Employment Standards Tribunal