

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 -

Earlybirds Awards Inc.
(" Earlybirds ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Cindy J. Lombard

FILE No.: 1999/632

DATE OF HEARING: December 20, 1999

DATE OF DECISION: February 18, 2000

DECISION

APPEARANCES:

The Appellant-employer, Earlybirds Awards Inc., was represented by an owner, Treva Stubbs, who gave evidence.

The Respondent-employees, Faith Horne (“Horne”), Anne Flanagan (“Flanagan”), and Dora Weninger (“Weninger”), appeared and gave evidence. The Respondents, Michael Alexander, Jesai Chantler and Andrea Vollans, did not appear.

OVERVIEW

This is an appeal by the employer, Earlybirds Awards Inc. (“Earlybirds”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a determination of the Director of Employment Standards (the “Director”) issued on September 28, 1999.

The Respondents were employed during the following dates:

- a) Horne February 1995 to February 28, 1999
- b) Flanagan October 1995 to March 31, 1999
- c) Weninger November 1997 to January 31, 1999
- d) Austin February 3, 1999 to May 31, 1999
- e) Chantler August 1995 to February 28, 1999
- f) Vollans April 1998 to March, 1999

When each of the Respondents commenced their employment with the employer, they entered into an Agreement to work as an independent contractor and not as an employee. The Respondents were paid on a commission and bonus system based on minutes spent with each customer on the telephone. Time was tracked by both the employee and confirmed by the employer with B.C. Tel telephone records. As independent contractors, the employer did not hold or remit source deductions to Revenue Canada.

In 1998, Revenue Canada reviewed the relationship between the employer and the Respondents and issued a ruling that the Respondents were employees as that word is defined by the Income Tax Act retroactive to January 1, 1998, with the consequence that both the employer and Respondent-employees were required to make remittances effective January 1, 1998.

The Revenue Canada decision was appealed by Earlybirds and the ruling was upheld. In February 1999, after losing their appeal, Earlybirds commenced paying the Respondent-employees as employees rather than as independent contractors.

The Respondents, who ultimately left the employment of Earlybirds, sought a determination that they were employees for the period January 1, 1998, to the date of their termination. The issues before the Director thus, were:

- I. Were the Respondents employees as that word is defined by the *Act* during the period January 1, 1998, to date of their termination?
- II. If they were employees, did they receive all benefits owing under the *Act*, including wages, overtime pay, statutory holiday pay and vacation pay?

After inquiry and review of all the evidence before him, the Director ruled that all Respondents were employees and not independent contractors and found that the Respondents had not received all wages due as well as overtime and statutory holiday pay as required by the *Act*. The Director then ruled that the following monies were due to the Respondents:

a)	Horne	\$2,828.10
b)	Flanagan	\$3,027.36
c)	Weninger	\$2,731.83
d)	Austin	\$56.70
e)	Chantler	\$3,910.24
f)	Vollans	\$1,000.00

ISSUES TO BE DECIDED

The issues raised on appeal in response to the determination are as follows:

- I. Were the Respondents employees or sub-contractors from January 1, 1998, to the date of their dismissal?
- II. If they were employees, did they receive all benefits owing under the *Act*, including wages, overtime pay, statutory holiday pay and vacation pay?

The onus is on the employer to show that that determination is incorrect.

THE FACTS AND ANALYSIS

- I. Were the Respondents employees as that word is defined by the *Act* during the period January 1, 1998, to date of their termination?

Section 1 of the *Employment Standards Act* provides:

“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;

“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;

Some of the factors to be considered in the question as to whether the relationship is that of contractor/sub-contractor or employer/employee are:

1. Did Earlybirds have control or direction of the Respondents?
2. Who owns the tools of trade?
3. Were the Respondents an integral part of the business?
4. Who has the chance of profit and loss?

If Earlybirds had control or direction of the Respondents, owned the tools used, the Respondents were an integral part of the business, Earlybirds alone has the chance of profit and loss, then the relationship is that of employer-employee. In this case:

1. Who had control and direction?

Earlybirds’ position is that they did not have control over the scheduling of hours of the Respondents, rather the Respondents would write down their availability for two weeks in advance and then Earlybirds would let them know whether they were needed. Some of the Respondents wanted to work a certain shift and Earlybirds said it tried to meet those preferences. Furthermore, Earlybirds says that it did have meetings with staff but that the Respondents were not required to attend rather it was recommended that they did in order to be “in the know”.

To the contrary, the Respondents say that Earlybirds did exercise control over them. The Respondents confirm that they did sign up two weeks in advance and indicated their availability; however, they were expected to be consistent in being available to work or their job would be in jeopardy. Furthermore, the Respondents say that they were required to show up to the regular staff meetings. The Respondents state that if they wished to leave a shift, they had to get the permission of the person in charge, ie. the pilot.

The Respondents furthermore advise that they did not have their own clientele and could not openly perform work for any competitor.

On the whole of the evidence, I find that Earlybirds did have control over the Respondents.

2. Tools of Trade

It is the position of the employer that the Respondents owned the tools of trade, which included their own equipment to do their psychic readings such as cards, books and crystals. Earlybirds stated as well that some of the psychics ran their own advertisements in order to generate business.

The Respondents agree that they did own those tools of trade; however, they point out that Earlybirds provided the physical premises, which included a desk, partitions and telephones and telephone lines. The Respondents were required to keep minute-sheets which were handed in each day and logged by the person in charge i.e. pilot. The Respondents were then paid sixty days later if their log matched the B.C. Telephone log.

I find that that Earlybirds did provide the majority of the tools of trade.

3. Were the Respondents an integral part of the Earlybirds' business?

The Respondents on the facts were an integral part of the Earlybirds' business. They worked regular shifts, they had to report in and out, they were expected to attend regular staff meetings, for the most part the relationship was long standing and exclusive of other employment. The employer made out the invoices, which were signed by the employee prior to payment of monies for their services.

4. The chance of profit or the risk of loss.

It is clear from the evidence that the Respondents had no risk. They supplied very little in terms of capital, merely some books, cards or other small items to aid their work as psychics. The majority of the economic risk was by far with Earlybirds who provided the telephone lines, the place of work, the furniture and assumed all of the financial risk. The only chance of increasing any profit that the Respondent had was strictly on a commission basis. It was Earlybirds who stood by far the most to profit from its investment of capital.

For the foregoing reasons, I agree with the Director's determination that the relationship between Earlybirds and the Respondents was that of employer and employee and thus the Respondents have the rights accorded to them under the *Act*.

II. If they were employees, did they receive all benefits owing under the *Act*, including wages, overtime pay, statutory holiday pay and vacation pay?

The appellant did not produce any evidence that the Director had erroneously calculated the wages, overtime and vacation pay amounts due to the Respondents.

SUMMARY

The onus is on the employer to show that the Director's determination is incorrect. The employer has not satisfied that onus for the reasons outlined.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination with respect to the Respondents be confirmed as issued in the total amount of \$13,554.23.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal