

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 -

Suzanne Ashley and Kathryn Nadine Ferster operating as
Body & Soul Health & Beauty Center
("BSHBC" or "the Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 98/735

DATE OF HEARING: February 22, 1999

DATE OF DECISION: February 26, 1999

DECISION

APPEARANCES

Suzanne Ashley on behalf of Suzanne Ashley and Kathryn Nadine Ferster operating as Body & Soul Health & Beauty Center

Adele Brodoway on her own behalf

OVERVIEW

This is an appeal on behalf of Suzanne Ashley and Kathryn Nadine Ferster operating as Body & Soul Health & Beauty Center (“BSHBC”), under Section 112 of Employment Standards *Act* (the “*Act*”), against a Determination which was issued on October 30, 1998 by a delegate of the Director of Employment Standards (the “Director”).

The Determination requires payment of “wages” to two former employees of BSHBC, Adele Brodoway and Tracy Wira. The Director has determined that Adele Brodoway is entitled to “wages” in the amount of \$754.52 and Tracy Wira is entitled to \$673.22 in unpaid vacation pay.

BSHBC’s appeal is based on two grounds:

1. Tracy Wira was an independent contractor rather than an employee; and
2. Adele Brodoway engaged in activities which had a significant negative impact on its business and which will result in her “prosecution to the full extent of the law.”

A hearing was held in Abbotsford on February 22, 1999. At that time, Ms. Ashley, on behalf of BSHBC, acknowledged that she did not challenge nor dispute the Director’s finding that Ms. Brodoway has not been paid wages for the hours she worked between September 22 and October 1, 1997 inclusive. However, Ms. Ashley submitted that the *Act* is “unfair and unjust” if she is required to pay wages to Ms. Brodoway when she has been named as a party to a civil action in which Ms. Ashley is seeking to recover damages arising from “theft of (her) client list.” In light of Ms. Ashley’s submission, I would confirm the Determination insofar as it deals with her entitlement to “wages” under the *Act*.

The Tribunal did not receive any submission from Tracy Wira in response to BSHBC’s appeal and she did not attend the hearing on February 22, 1999. Mr. Wira currently resides in Saskatchewan.

FACTS

After conducting an investigation, the Director's delegate gave the following 'facts and findings' for concluding that Tracy Wira was an employee and is entitled to vacation pay under Section 58 of the *Act*:

Suzanne Ashley, one of the owners, stated that she viewed Tracy Wira as a subcontractor as she was working for other businesses. Ms. Ashley also stated that no deductions were taken off. (sic) The employer's position is that Tracy Wira was not an employee and is not entitled to vacation pay according to Section 59(1) of the *Employment Standards Act*.

Tracy Wira began working for the employer in May 1996 and quit her employment on April 30, 1997. Ms Wira claims that she was an employee according to the *Employment Standards Act* due to :

1. The employer had total direction and control of what hours were to be worked.
2. All the products that were used were supplied by the employer.
3. Ms. Wira had no input regarding how the business was to be run.
4. Deductions were taken off pay cheques.

This is the full text of the 'facts and findings' given by the Director's delegate in respect of Ms. Wira's entitlement to vacation pay under the *Act*.

There is no dispute that Ms. Wira was associated with BSHBC as a stylist/esthetician from May 1996 to April 30, 1997 and was paid solely by commission (55% of revenues generated by her).

The Director's calculation of Ms. Wira's total gross earnings for 1996 and 1997 and his method of calculating entitlement to vacation pay are not disputed by BSHBC.

Ms. Ashley made submissions and gave evidence on each of three grounds of appeal.

Direction and control

Ms. Wira "set out her own hours and days of work." For example, Ms. Wira decided without consulting Ms. Ashley on which days she would be available to accept appointments at BSHBC. By agreement, Ms. Ashley would contact Ms. Wira by cellular telephone when a client wished to make an appointment with Ms. Wira. In addition to providing service to clients as BSHBC, Ms Wira also served clients at another business, 'Hair Alternatives' throughout the time that she was associated with BSHBC. In addition, Ms. Wira occasionally provided service to clients at fashion shows during the period of time in question.

Products

Ms. Ashley testified that Ms. Wira provided her own equipment (esthetics bed, pedicure chair, manicure table, light sterilizer, etc.). However, BSHBC provided 'consumable' products for Ms. Wira's use under the terms of the commission agreement into which they had entered.

Deductions from earnings

Ms. Ashley acknowledges that no deductions were taken from Ms. Wira's commission earnings between April and September, 1996. At that point, she testified, her accountant instructed her to make deductions for C.P.P. and U.I.C. but income tax was not withheld. The 'Statement of Remuneration Paid' ("T4") issued to Ms. Wira for 1996 earnings shows \$207.47 for 'Employer's CPP Contributions' and \$291.22 for 'Employee's EI premiums'. However, in BSHBC's appeal submission, Ms Ashley makes the following admission:

Also, during the time of April thru Sept 96 I never took any deductions off her cheques. When my accountant instructed me to do so, I started to take deductions. On her 1996 T-4 I claimed full deductions for the entire period. I told Tracy that she would have to pay me back for those deductions as the government would now require that I pay the money to them on her behalf. I am enclosing a copy of cheques written to her for this same period to show that I did not take them off her cheques and that the amount of those deductions claimed to be taken off on her T-4 are outstanding and owed to inc to a total of \$308.84.

ANALYSIS

The following statutory definitions are contained in Section 1 of the *Act*:

"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;

In a recent decision, *Project Headstart Marketing Ltd.* (BC EST #D164/98), the Tribunal noted that the *Act* "...casts a somewhat wider net than the common law in terms of defining an 'employee'." That comment was made in the context of a discussion about the relevance of the common law test that are generally known as the "four-factor" and the "organization/integration" tests.

My review of the 'facts and findings' set out by the Director's delegate as the basis for concluding that Ms. Wira was an 'employee' who is entitled to vacation pay gives me several causes for concern. First, the 'facts and findings' are nothing more than a recitation of the parties' statements to the Director's delegate. That is, the Director's delegate does not make any findings of fact in the face of conflicting statements by Ms. Ashley and Ms. Wira. Second, the Determination is defective in that it does not contain any 'reasons', as required by Section 81(1)(a) of the *Act*. Third, the evidence before me does not support Ms. Wira's view that "the employer had total direction and control of what hours were to be worked" as Ms. Ashley's testimony on this point was uncontroverted by either the Director's delegate or Ms. Wira. Similarly, the evidence before me refutes the view that "(a)ll the products that were used were supplied by the employer." The evidence shows that "consumable" products were provided by BSHBC under the terms of its commissions agreement with Ms. Wira, but Ms. Wira provided all of her own tools and equipment. Finally, the taking or non-taking of deductions from Ms. Wira's commission earnings is not determinative of her status as an employee under the *Act*. It is entirely possible that an employment relationship could exist for purposes of the *Income Tax Act* without the same being true for the purposes of the *Employment Standards Act* because the statutory definitions and statutory purposes of the two pieces of legislation are quite different. Given the paucity of accurate records and clear oral evidence on this point in this appeal, I find the evidence I have on this point to be unhelpful.

For all of these reasons, I find that insofar as the Determination purports to establish Ms. Wira's entitlement to vacation pay under the *Act*, it is so defective that it must be varied.

ORDER

I order, under Section 115 of the *Act*, that the Determination be varied to show only that Adele Brodoway is entitled to receive wages in the amount of \$708.39 plus interest in accordance with Section 88 of the *Act*.

Geoffrey Crampton
Chair
Employment Standards Tribunal