Employment Standards TRIBUNAL

An appeal

- by -

Yasmin Farrokhseresht operating as Yasmin Hair Salon
("Farrokhseresht")

- and by -

Stephen Salomon
("Salomon")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/147 and 2000/225

DATE OF HEARING: July 5, 2000 and December 5, 2000

DATE OF DECISION: March 2, 2001

DECISION

OVERVIEW

Yasmin Farrokhseresht operating as Yasmin Hair Salon ("Farrokhseresht", her last name is misspelled in the Determination) appeals, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), a Determination issued on February 23, 2000 by a delegate of the Director of Employment Standards ("the Director"). The Determination is that Farrokhseresht employed Stephen Salomon and that she must pay Salomon a total of $317.63 in wages including interest.

Stephen Salomon also appeals the Determination.

Farrokhseresht, on appeal, argues that the Determination is wrong in that Salomon was not her employee but a person engaged as an independent contractor.

Salomon, on appeal, claims that the Determination is wrong because it fails to take into account the total number of hours worked by him. According to Salomon, he is owed several thousand more than $317.63. He produces new evidence which is said to show the full extent of his work.

APPEARANCES

Yasmin Farrokhseresht	On her own behalf
Nick Cameron	Interpreter for Farrokhseresht
Hammid Bokaie	Witness
Alison M. Ward	Counsel for Salomon
Stephen Salomon	

BACKGROUND

Just holding a hearing has proved difficult in this case. The Tribunal set a hearing for June 22, 2000 but that hearing had to be postponed because Farrokhseresht's mother fell seriously ill and Farrokhseresht had to travel to the U.S. state of Texas for the purpose of attending to her mother.

A hearing was then set for July 5, 2000. On arriving for that hearing at the appointed time and place, I found that Salomon had filed an eleventh hour request for a postponement. Salomon said he had a boil and that he could not sit down. On observing him, I decided that he was in fact in considerable pain and unable to concentrate on the task at hand. The hearing was adjourned in the interest of fairness.

In that Farrokhseresht had travelled from Texas to be at the hearing set for the 5th and she planned on returning to Texas, Salomon was advised that the Tribunal would make some effort to accommodate Farrokhseresht in arranging a new date for a hearing. A hearing was arranged for the 5th of December as that suited Farrokhseresht. She was to be at a Tax Court of Canada hearing in Vancouver on the 1st of December, 2000.

On the 14th of November, Farrokhseresht requested that the December 5 hearing be postponed. That request was denied. Farrokhseresht was advised that she could attend the hearing in person or attend by telephone conference call.

The hearing set for the 5th of December, 2000 went ahead as planned but it was not without complications. Farrokhseresht had chosen to attend the hearing by telephone conference call. I had just finished hearing what are Salomon's closing arguments and statements when contact was lost with Farrokhseresht. While contact was eventually re-established, it was by then almost 6 o'clock and time to adjourn. In that I had finished hearing evidence and, at that point, I had only to receive what Farrokhseresht had in the way of closing statements and argument and Salomon's response, I decided that the efficient way to proceed was by way of further written submissions. In due course, further written submissions were received and exchanged.

ISSUES TO BE DECIDED

At issue is the delegate's finding that Salomon was employed by Farrokhseresht.

If Salomon is found to be an employee, the issue is then one of the amount which is awarded Salomon.

What I must ultimately decide is whether it is or is not shown that the Determination ought to be varied or cancelled for reason of an error or errors in fact or law.

FACTS

The parties agree on little and much of what they consider to be fact is not shown to be fact.

There is no disputing that Yasmin established a hair cutting and styling salon on Davie in Vancouver ("the salon") and that Stephen Salomon worked as a hair stylist in the salon.

Salomon is an experienced stylist who is fully versed in all aspects of the trade, cuts, styling, perms and hair colouring. He goes by the name "Starr".

It is clear that Salomon started to perform work in the salon in 1997 and that he continued to work in the salon until November of 1998. Salomon claims, however, that he started work on the 7th of February, 1997 while Farrokhseresht claims that Salomon said that he would begin work in February but did not start working in the salon until September. I find that the evidence

supports a February start. An ad was placed in the February 27, 1997 edition of the "*WESTENDER*", a weekly newspaper, and it announces that "Starr is now at Yasmin Hair Salon" (my emphasis). Frederick Lee, publisher of "*Xtra West*", another newspaper, sent Salomon a letter dated August 6, 1997 in which Salomon is congratulated for being silver award winner as best hair stylist in a poll of readers and the letter is addressed to Starr at "Yasmin Hair Salon". And I find that Farrokhseresht has failed to produce evidence which clearly rules out a February start.

Farrokhseresht makes much of the fact that she travelled to the U.S. on May 23, 1997 and the fact that a request for cancellation of her GST registration was approved. I find that that is not to establish that Salomon started work in September.

The Determination is that Salomon is an employee. That appears to have been obvious to the delegate in that he has little to say on the matter of whether Salomon is or is not self-employed. He simply makes note of, and concurs with, a federal government decision which is that Salomon was employed by Farrokhseresht on a part-time basis and entitled to Employment Insurance. As Farrokhseresht did not provide Salomon with a T4 for either 1997 or 1998, Revenue Canada did that for her.

Farrokhseresht, on appeal, claims that Salomon was in business for himself and that her diary shows that. She claims that Salomon did his own advertising (that it was he that put the ad in the WESTENDER), that he supplied his own chair, that he supplied other equipment, that he bought supplies from her, that he had his own customers and that it was he who decided what to charge the customers, that he set his own hours of work, that he was open to both profit and loss, and that she did not control the work that Salomon did.

I find that the facts of this case are as follows:

- Farrokhseresht provided the premises, the chair that Salomon used for cutting hair, towels and other materials (for example, the appointment books which Salomon used. Farrokhseresht claims that the appointment book is salon property);

- Salomon supplied scissors, combs, brushes, a cape, a blow-dryer and a chair which was used for "technical treatments";

- it was the salon that supplied the products that were used for styling and hair colouring;

- Salomon, some months into the relationship, began to pay for some of those products;

- like most salons, the customers chose who would do their hair, Farrokhseresht or Salomon;

- Salomon had flexible hours of work but he was expected to be at the salon when Farrokhseresht was not;

- assistants were hired by Farrokhseresht;
- Salomon and Farrokhseresht used the same cash register, and
- on the basis of Farrokhseresht's hand-written memo dated September 25, 1998; and her note on what to charge for beard trimming, not $5.00 but $7.00, I find that it was Farrokhseresht that set the price that the customers were charged, that she perceived herself to be the boss, and that she told Salomon what to do and how to act.

The parties differ on the rate of pay and Salomon claims that he should be reimbursed for the supplies that he purchased. I have not been provided with a written contract in this case, nor payroll records, pay stubs, invoices or any other record or evidence, from which the agreed rate of pay or even the arrangement on supplies can be ascertained, however.

I find that there is not evidence to show that Salomon was carrying on business over and above, or outside of, his work at the salon. No clear evidence to the contrary, I find that the salon was Salomon's only source of income.

ANALYSIS (the relationship)

A purpose of the *Act* is "to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment" (the *Act*, section 2).

Section 1 of the *Act* defines the terms "employee", "employer", "wages" and "work". Those definitions are as follows,

> "***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 the work normally performed by an employee, … .*
>
> "***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 benefit, to a fund, insurer or other person, … .*
>
> *"**work**" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*

The Court of Appeal has said that the definitions of employer and employee are to be given a liberal interpretation [*Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170].

> "the definitions in the statute of "employee" and "employer" use the word includes" rather than "means". The word "includes" connotes a definition which is not exhaustive. Its use indicates that the legislature casts a wide net to cover a variety of circumstances."

I also consider the following comments from the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd.*, (1998) 154 D.L.R. (4th) 193 to be applicable:

> "Finally, with regard to the scheme of the legislation, since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits - conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant."

The *Act*'s definitions are annoyingly circular and, as such, they are of limited use in deciding whether some persons are rightly considered to be self-employed or an employee. But, as the *Act* is intended to provide persons with minimum employment standards, and the definition of employee is to be given a liberal interpretation, it is clear to me that the Tribunal should not be inclined to finding that a person is not an employee but self-employed where the result is that the person ends up receiving less than the *Act*'s basic minimum standards (the minimum wage, overtime, a paid vacation and statutory holidays). That being said, I realize that, while rare in number, there are some individuals who choose to forego income because they expect to earn greater profits at some point in the future.

In this case, I find that there are not clear facts to support a conclusion that Salomon was self-employed. I am led to believe that he had but one source of earnings; he was paid little more than the minimum wage, if that; he received neither vacation pay, nor statutory holiday pay; and

that no attention was being paid to the overtime provisions of the *Act*. It is clear to me that Salomon is the very sort of worker which the *Act* is designed to protect.

There are cases which require a more elaborate approach to deciding whether a person is an employee or an independent contractor is required. In *Boss Carpet World Inc.*, BCEST No. 315/00, borrowing heavily from *Cove Yachts(1979) Ltd.*, BCEST D421/99, I described that as an analysis which considers any relevant factor, the following included:

- The actual language of the contract;
- control over the "what and how" of the work;
- ownership of the means of performing the work (e.g. tools);
- chance of profit/risk of loss;
- the person's remuneration and the source of his or her earnings;
- the right to hire and delegate;
- the power to discipline, dismiss, and hire;
- how the parties perceive their relationship and how it is perceived by outsiders;
- the intention of the parties;
- the degree of integration between the parties; and
- if the work is for a specific task or term.

Yet even when the above factors are considered I am led to the conclusion that I should regard Salomon as an employee. I find that there are important facts pointing to that. Farrokhseresht exercised a degree of control which is consistent with that which is normally exercised by an employer; she provided the place of work and important gear and equipment, towels and the chair used for hair cutting; it is not shown that Salomon was open to profit and loss or that he had any source of income beyond that received for reason of his work in the salon; Farrokhseresht set the price charged customers and she reprimanded Salomon for charging too little for beard trims; the work was not for a specific task or term but was ongoing; and it is clear to me that Farrokhseresht exercised substantial control over the what and when of the work and that she perceived herself as the boss.

I am satisfied that the delegate is correct in deciding that Salomon is an employee. The decision that Salomon is an employee and covered by the *Act* is confirmed.

FACTS

On filing his Complaint, Salomon claimed that he was owed almost $7,000 in wages. The delegate awards neither regular wages, nor overtime pay but only compensation for length of service, vacation pay and statutory holiday pay, a total of $292.87 plus interest.

The delegate declined to award regular wages and overtime pay because he found that there were not detailed payroll records on which to rely.

The employer (I will now refer to Farrokhseresht both by name and as "the employer") did not keep records as required by section 28 of the *Act*.

> ***28*** *(1) For each employee, an employer must keep records of the following information:*
>
> *(a) the employee's name, date of birth, occupation, telephone number and residential address;*
>
> *(b) the date employment began;*
>
> *(c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;*
>
> *(d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;*
>
> *(e) the benefits paid to the employee by the employer;*
>
> *(f) the employee's gross and net wages for each pay period;*
>
> *(g) each deduction made from the employee's wages and the reason for it;*
>
> *(h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;*
>
> *(i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;*
>
> *(j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.*
>
> *(2) Payroll records must*
>
> *(a) be in English,*
>
> *(b) be kept at the employer's principal place of business in British Columbia, and*
>
> *(c) be retained by the employer for 7 years after the employment terminates.*

Salomon produced a computer printout in support of his Complaint but the delegate found the printout to be "questionable", "obviously made after the fact", and "designed to support (the employee's) claim". The delegate states that the computer printout is not "sufficiently accurate to make any determination on minimum daily pay and overtime".

The Determination awards length of service compensation, vacation pay and statutory holiday pay on the basis of the T4 slips which were prepared for the employee by Revenue Canada. They have Salomon earning $657.96 in 1997 and $2,413.00 in 1998. The delegate indicates in the Determination that he was led to believe that Salomon was a part-time employee and that the T4's seem about right.

The delegate awarded nothing for supplies. He explains that is because he was given no idea of what the shop supplies were, he was not provided with a detailed account of what is owed and that it appeared to him that Salomon's claim was nothing more than an estimate. The delegate also expresses doubt as to whether Salomon was actually out of pocket moneys paid for supplies.

On appeal, Salomon again claims regular wages and overtime wages, $375 for supplies, and much more money than the amount of compensation for length of service, statutory holiday pay and vacation pay that he is awarded in the Determination. He does not present an accounting of and records which establish that he is owed moneys for supplies. He is seeking to introduce new evidence on appeal as a way of bolstering his claim for regular and overtime wages, bank account records as proof of net pay, and what is said to be his appointment book for 1998 as proof of work.

Revenue Canada (now Canada Customs and Revenue Agency) has revised the T4's which it produced for Salomon. It has been decided that Salomon began work on the 7th of February, 1997 and it is not $657.96 that Salomon earned in 1997 but $1,783.36 and that it is not $2,413.00 that Salomon earned in 1998 but $3,908.28 (see the January 28, 2000 Tax Court of Canada ruling [1999-4429 (EI)]). The Canada Customs and Revenue Agency has also decided that Salomon performed 255 hours of work in 1997 and 559 in 1998.

ANALYSIS (quantum)

The Tribunal has said [see *Tri-West Tractor Ltd.* (BCEST No. D268/96) and *Kaiser Stables Ltd.* (BCEST No. D058/97], that it will not normally allow an appellant to raise issues or present evidence which could have been raised or presented at the investigative stage. In *Tri-West*, the principle is stated as follows:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. … The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

I see no reason to make an exception here. Salomon is attempting to make a case that should have and could have been given to the Director's delegate. The delegate can hardly be faulted for failing to consider records which were not put to him.

It is not as if, moreover, it is an unreasonable conclusion which the delegate has reached in regard to the computer printout which the employee supplies. The Tribunal has said that where an employer fails to keep a record of hours worked, the Director may rely on other evidence which indicates the extent of work, including records kept by an employee. But not just any record will do. There must be some reason to believe that the record is essentially accurate. And I find that no such reason exists with respect to the employee's computer printout. It is not founded on records of work which are contemporaneous with the work but is obviously made up.

I am satisfied that the delegate was not presented with a basis for awarding moneys which were paid for supplies. No such basis is presented to me.

I am satisfied that the delegate did not have any record by which he could establish total hours worked and the amount paid, except for the T4's that were prepared by Revenue Canada. I find, however, that in accepting those T4's the delegate has unwittingly accepted that Salomon did not start working for Farrokhseresht in February but September. The T4 which had been prepared for 1997 has him earning only $657.96. That is not consistent with a February start but a September start.

I have already found that the evidence supports a conclusion that Salomon started work in February, not September. The Canada Customs and Revenue Agency has reached that same conclusion and has, for that and other reasons, varied the initial set of T4's that were prepared for Salomon. I am not bound to accept a finding by the Canada Customs and Revenue Agency, or the Tax Court of Canada for that matter, but I am prepared to accept the new earnings and hours worked figures of the Canada Customs and Revenue Agency in this case, the employer failing to keep records as are required by the *Act*, and the Canada Customs and Revenue Agency having decided that the initial set of T4's are wrong.

In accepting the revised income and hours worked figures of the Canada Customs and Revenue Agency, I realize that they have been appealed and that the decision of Canada Customs and Revenue Agency is not the final decision. As I see it, however, what is required here is not perfection but reasonable accuracy. There is no need to wait for the final Tax Court of Canada decision. I need only be satisfied that the T4's as varied are reasonably accurate and a basis for awarding Salomon moneys under the *Employment Standards Act*. Of that I am fully satisfied.

I accept that Salomon earned at least $5,691.64 in working for Farrokhseresht ($1,783.36 plus $3,908.28) in 1997 and 1998 and also that Salomon worked 559 hours in the eleven or so months that he worked for Farrokhseresht in 1998. I have decided to order recalculation of the Determination, compensation for length of service included, so that it reflects that amount of earnings and that amount of work. Recalculation of the Determination is left to the Director.

I also award whatever further interest has accrued pursuant to section 88 of the *Act*.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated on February 23, 2000 be varied. The decision to award only compensation for length of service, vacation pay, statutory holiday pay and interest is confirmed but there is a need to recalculate the amount wages and interest which Yasmin Farrokhseresht must pay Salomon.

LORNE D. COLLINGWOOD

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal