



BC EST #D106/96

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C.38

- by -

Laara Kencayd, carrying on business as
Laara Esthetics

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Jerry W. Brown

FILE No.: 96/180

DATE OF DECISION: June 4, 1996



DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against Determination No. CDET 001190 issued by the Director of Employment Standards (the "Director") through its delegate on February 14, 1996.

The Director determined that Laara Kencayd operating as Laara Esthetics ("Laara") was in breach of section 16 of the Act and the complainant, Jessica Holliday ("Holliday") would receive compensation in the amount of \$845.70 calculated as follows:

Hours worked per employee records (November 26 - December 31, 1994)		151.75 hrs
Minimum wage		\$6.00/hr
Wages for hours worked 151.75 hrs x \$6.00/hr	\$910.50	
Annual vacation pay 4% x \$910.50	36.42	
Less cash received	<u><120.00></u>	
Wages due	\$826.92	
Accrued interest per section 88(4)	<u>18.78</u>	
TOTAL DUE		\$845.70

Laara claims that there is no liability for compensation as set out by the Director's delegate above as Holliday was not an employee and therefore not entitled to the minimum wages set out in the Regulations. Laara has taken no issue with the calculations as set out by the Director's delegate.



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Written submissions were received from Laara and Holliday as well as materials from the Director's delegate.

FACTS

Holliday began working as a nail technician at Laara's premises on November 26, 1994. Holliday signed an "agreement" dated November 25, 1994. Laara signed the agreement dated November 25, 1994. The agreement included, among other things, the following:

1. [That Holliday and Laara agreed] to the terms and conditions of employment as follows;
2. A minimum term of employment of three months;
3. Confirmation on Holliday's part to comply with the rules and regulations of the shop;
4. A commission schedule indicating Holliday would receive 50% of commission for services she provides to customers of the shop and that Laara would withhold "the normal government deductions" ... "in the normal course of employment"; and
5. The work week was calculated from Saturday to Friday and the agreement included hours of work as follows: Tuesday, Wednesday, Friday and Saturday: 9:30am - 6pm; Thursday: 10am - 2pm.

Laara did not dispute that Holliday attended at the shop and worked these hours, nor did she dispute Holliday's records of the hours worked. Laara said that she did not keep records because she did not consider Holliday an employee. There was no dispute between Holliday and Laara that Holliday attended at the shop and performed a variety of duties, including receptionist, nail care and assorted other duties. Holliday's last day in the shop was December 31, 1994. At no time did Laara pay any monies to Holliday other than commissions in the amount of \$120.

ISSUES TO BE DECIDED

1. Was Holliday an employee of Laara? and



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2. If Holliday was an employee, what wages were owed?



ANALYSIS

Laara may have assumed that Holliday was an independent contractor, but it is my view that the relationship was one of employer/employee.

The Act defines "employee", "employer" and "work".

The Act's definition of an employee is 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,
- (c) A person being trained by an employer for the employer's business,
- (d) A person on leave from an employer,

The Act defines an employer as follows:

"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.

The Act defines work as follows:

"Work" means the labour or services an employee performs for an employer whether in the employer's residence or elsewhere.

One of the main factors to be considered in determining whether a person is an employee or an independent contractor will be the degree of direction or control which the employer has in the relationship. When making such a determination, the courts and administrative tribunals have developed several tests which distinguish employees from independent contractors.

There is a four-fold test which determines when the relationship is one of employer and employee. If a person in question is under the direction and control of an employer regarding the time, place,



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and way in which the work is done the more likely it is that that person is an employee. This test also considers who owns the tools, whether there is a chance of profit, whether there is a risk of loss. I should note that when dealing with the chance of profit or risk of loss this does not mean whether or not the person is paid on a commission basis. In other words, a commission salesman may still be an employee.

The integration or organizational test looks at whether the person's work is integrated within the employer's business. The more integrated the work, the more likely the person is an employee. Generally, the greater the degree of control the employer has in terms of supplying goods and services, retaining direction and control or economic dominance, the greater likelihood of employment status.

Reviewing the materials presented, I find on the balance of probabilities that Holliday was an employee and that Laara was an employer. The agreement itself clearly establishes that Laara is to have a significant amount of control and direction over Holliday,

Also, in Laara's testimony, she makes references to indicate that she is in fact an employer and perceives Holliday to be an employee. More particularly, she says that she helped provide transportation for Holliday and helped provide babysitting for her child. She said it was "a kindness few employers extend to employees". While Laara's intentions may have been good in attempting to help Holliday with her development as a technician, it is quite clear on the evidence that Holliday was an employee. While Holliday provided her own tools to some extent, this is in keeping with the nature of the business and in no way affects the determination that she was an employee and not an independent contractor.

It is clear that Laara was Holliday's employer, that Laara had significant control and direction over Holliday and was directly responsible for hiring Holliday.

There is also no question that Holliday performed work for Laara which went beyond what would be covered under the commission arrangement.

Section 16 of the Act requires employers to pay the minimum wage as prescribed by the Regulations. The employer must pay at least the agreed upon rate of pay, but this agreed upon rate of pay must at least meet the minimum wage as set out in the Regulations. The employer is obliged to make up the difference between the agreed upon rate of pay or commission if the minimum wage standard is not met.



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There is no dispute as to the number of hours worked by Holliday. There is no dispute with the fact that Holliday only received \$120.

Given the above determination that Holliday is an employee, that Laara was the employer and that Holliday performed work for Laara, and that Holliday did not receive the minimum wage as prescribed by the Regulations, there is nothing before me that persuades me to vary or cancel the determination of the Director's delegate in this matter.

ORDER

In summary, I order under Section 115 of the Act, that this appeal should be dismissed and that Determination No. CDET 001190 be confirmed in the amount of \$845.70.

JERRY W. BROWN
Adjudicator
Employment Standards Tribunal
EKB:98622