

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 -

Lisa Julson
("Julson ")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE NO.: 96/714

DATE OF HEARING February 17, 1997

DATE OF DECISION: March 6, 1997

DECISION

APPEARANCES

Lisa Julson	On her own behalf
Carol Dodge	In Stitches Consulting
Ken White	Employment Standards Branch

OVERVIEW

This is an appeal by Lisa Julson (“Julson”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against Determination No. CDET No. 004650, which was issued by Mr. Ken White, a delegate of the Director of Employment Standards, on November 12, 1996. The delegate determined that In Stitches Consulting Inc. had not contravened Section 18(2) of the *Act* by failing to pay Julson wages based on the rate of \$30,000 per year. The basis of Julson’s appeal is that her rate of pay was \$40,000, and monies paid her after she resigned her position should be based on that rate of pay.

A hearing was held on February 17, 1997, and evidence was given under oath.

ISSUE TO BE DECIDED

What was Julson’s annual rate of pay?

FACTS

Julson was employed in March 1990 as the Vice President/General Manager of In Stitches Consulting Inc. (“In Stitches”). She resigned her position on May 21, 1996. On June 11, 1996, the President of In Stitches, Carol Dodge (“Dodge”), sent Julson her wages owing, vacation pay and record of employment. On June 25, 1996, Julson wrote to Dodge requesting payment based on her “regular salary of \$40,000 per year”. There was a further exchange of correspondence between Julson and Dodge, without affecting the final outcome of Dodge’s payment to Julson.

In Stitches organizes trade shows for exhibitors connected with sewing, cloth and the like in Canada and the United States. Julson was paid for much of her employment, certainly the last two years, at the rate of \$2500 per month. On April 7, 1995, In Stitches issued Julson a cheque for \$10,000. There were no deductions from the gross amount. Both the cheque and the stub contained the notation “bonus.” A similar payment was made on April 26, 1996, and the stub contained the notation “bonus.” The manager of In Stitches’s bank confirmed that the notation “bonus” on the April 7, 1995 cheque was identical on the

original cheque and the copy issued to Dodge. Julson had raised the possibility that the notation was added after the cheque was issued.

Julson maintained that she was employed by In Stitches for \$30,000, but in 1993, she was offered a raise to \$40,000 and in fact was paid \$38,000 for that year, since the salary increase did not take effect until some weeks into the year. According to Julson, the \$10,000 paid to her in April 1995 was the remainder of her 1994 salary, and the April 1996 cheque completed her salary for 1995. The arrangement she and In Stitches had was that she would be paid the last installment of her salary after January 1 of the following year, because the firm generated most of its cash flow for the year during the fall months. Dodge testified and informed the delegate of the Director that Julson's salary was \$30,000, with the additional sums of \$10,000 paid in the form of bonuses either for Julson's special efforts on behalf of In Stitches or as recognition of the financial success of the company.

Julson testified that she was offered a further raise to \$48,000 in July 1995, but the company had a poor year, and it could not honour the promised raise. However, Dodge did offer to pay \$10,000 in the spring of 1996. Separate T-4 tax forms were issued. Julson testified that she asked Dodge for her full draw of \$4,000 per month in the spring of 1996, at least in part because of tax problems with the method of payment for the previous year. Dodge agreed to increase the monthly draw after March 1996, and deal with the first three months of the year later. Julson then instructed the bookkeeper to issue cheques for April and May to reflect a \$40,000 annual salary. Dodge acknowledged that she signed the cheques, but did not inspect the amounts closely.

Julson and Dodge had a falling out in May 1996. Julson had traveled to Philadelphia for a show and stayed in the area with relatives, doing some preparation for a forthcoming show in Atlanta and also using some compensatory time off. Julson called Dodge on May 21 and resigned effective that date. According to Julson she worked on the Atlanta show using an In Stitches computer after May 21. She and Dodge met briefly in the Philadelphia airport on May 26, when Julson transferred several boxes of materials destined for the Atlanta show to Dodge. According to Dodge, after Julson declined to reconsider her resignation, she told Julson that she (Dodge) would handle the arrangements for Atlanta. Dodge was emphatic that she did not ask Julson to continue to work on the Atlanta show and she did not want her to do the work. Dodge told Julson not to come to the office until she returned from Atlanta. Dodge was in the office around May 31 and asked Julson to come in on June 7. They did meet then, and Julson asked Dodge for a Record of Employment indicating a layoff, which Dodge refused to issue. Julson worked in the In Stitches office on June 7. Dodge stated that she did not ask or require Julson to do the work. Julson and Dodge met and corresponded several times after Dodge's return to the Vancouver area. At one point, Dodge considered paying Julson on the basis of the \$40,000 annual salary, but she evidently changed her position.

When In Stitches was in the process of issuing Julson her final pay cheque, it reduced the payment for wages and vacation pay to reflect an annual salary of \$30,000, not the \$40,000 level on which the April and May cheques were based. In Stitches did not pay Julson for any work after May 21.

Mr. White inspected the payroll records of In Stitches and found that Julson had been paid \$30,000 in 1994 and 1995, with the separate cheques for \$10,000 in 1995 and 1996. Julson's rate of pay was increased for the months of April and May 1996. The accountant advised Mr. White that the rate was changed at Julson's direction, without approval from Dodge. When Dodge learned of the change, the rate was reduced and adjustments made to the final pay cheque.

Considerable evidence was presented about extra benefits Julson received while employed by In Stitches, the activities of the company and Julson's work after she resigned. After reviewing this evidence I concluded that it did not bear on the decision in this case.

There was no evidence of any written contract of employment for Julson.

ANALYSIS

Section 1 of the *Act* defines wages as follows:

- (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,

but does not include

- (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,

Julson argued in effect that the extra \$10,000 that she received in 1995 and 1996 qualified as wages under paragraph (b) of the definition of wages. In her mind, the money compensated her for the extra time she spent on her job and the production that resulted from her efforts. She also argued that she had an agreement with Dodge to raise her salary to \$40,000 at some point, either in 1993 or 1996.

Dodge maintained that the extra \$10,000 was paid at her discretion, depending on the financial success of the company. Since the company did not make a profit in 1996, she was not obligated to pay the bonus.

There clearly was a misunderstanding between Julson and Dodge about Julson's compensation. However, there was no evidence of a formal agreement between them as to Julson's rate of pay at any time. The documentation that was presented consisted of canceled cheques and stubs, which indicated "bonus" for the \$10,000 payments. While the cheque entries did not constitute a contract between Julson and In Stitches, they did indicate the employer's view of the rate and method of compensation.

Julson bore the onus of establishing that her wage was \$40,000 per year. To meet that onus, she was required to demonstrate that both parties to the transaction, i.e., herself and In Stitches as represented by Dodge, agreed to a specific rate of pay. No such evidence was presented.

While Julson performed services for In Stitches after May 21, she had resigned effective that date and was not instructed to perform any duties after the termination of her employment.

ORDER

I order pursuant to Section 115 of the *Act* that Determination No. CDET 004650 be confirmed.

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Mark Thompson
Adjudicator
Employment Standards Tribunal

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