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 -

Lora Hanel operating Country Hair Shop
("Hanel")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 1998/811

DATE OF HEARING: March 8, 1999

DATE OF DECISION: March 16, 1999

DECISION

APPEARANCES

for the Appellant:	Lois Knorr Dorothy Roy
for the individual:	in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Lora Hanel operating Country Hair Shop, ("Hanel") of a Determination which was issued on November 30, 1998 by a delegate of the Director of Employment Standards (the "Director"). In the Determination, the Director found Audree Sikorski ("Sikorski") to be an employee of Hanel and that Hanel had contravened Sections 16, 24, 44 and 58 of the *Act* in respect of the employment of Sikorski, ordered Hanel to cease contravening the *Act* and to pay an amount of $3755.50.

Hanel disputes two conclusions made in the Determination. The first is that Sikorski was an employee of Hanel. The second, if Sikorski was an employee, is that the amount of compensation ordered to be paid to Sikorski is based on errors of fact. The appeal was filed on behalf of Hanel by Lois Knorr and Dorothy Roy, who also represented Hanel at the hearing and were among six witnesses to give evidence in support of the appeal. Hanel has been unable to participate in the process as she was still recovering from a brain aneurysm she suffered on October 14, 1998.

ISSUE TO BE DECIDED

The issue is whether Hanel has met the burden of persuading the Tribunal that the Determination ought to be varied or canceled because the Director erred in fact or in law.

FACTS

The facts require considerable analysis, as there are numerous factual issues that have arisen
in this file. In her submission to the Tribunal on the appeal, the Director made the following comments:

> I have concerns that I was not advised by either party that Sikorski paid a monthly rental of $275.00 per month. The documentation supplied to me by Sikorski indicates that each day, the total cash received was totaled and

> 30% deducted which was given to the employer and Sikorski kept the balance.
>
> . . .
>
> The employer in her appeal states that Sikorski did not always work an 8 hour day or 40 hours a week. Sikorski says she did. My notes from my meeting with Sikorski show "always opened shop 9:00 AM and closed at 5:00 PM Tuesday through Saturday. When you look at the appointment book you can see where lines are drawn through, the employer states in her appeal that Sikorski was not available at those times, however, Sikorski states she was there. When dealing with these type of files, hairdressers, it certainly has happened that the stylist would put a line through the hours they were not available for work. Sikorski states that did not happen here.
>
> The complainant did some work for the Welcome Wagon. Sikorski states that work was done on Mondays, which was her day off, or in the evening, and that this work did not interfere with her work as a hairdresser.
>
> The whole issue at this point seems to be credibility.

Unfortunately, Hanel was unable to give evidence. I did hear from Sikorski and I was not impressed.

During the relevant period of time, May 20, 1997 to May 23, 1998, Hanel owned and operated the Country Hair Shop in Okanagan Falls. Sikorski joined Hanel May 20, 1997.

There are three main areas of dispute. The first relates to the basis upon which Sikorski went to work at the Country Hair Shop. In her statement accompanying the complaint, Sikorski says:

> I started working at Country Hair Shop on May 20, 1997 at Okanagan Falls, B.C. After spending my first week there, working 8 hours a day, 5 days per week, Lora Hanel, owner of Country Hair Shop, told me she couldn't pay me as an employee, that she could not afford to pay her portion of U.I.C. and C.P., but that I could pay her 30% for a chair rental. I needed the job. . .

She adopted that statement in her evidence before me. I do not accept her evidence in this area. The objective evidence is more consistent with the information given to the investigating officer by Hanel and stated in the Determination as follows:

> Mrs. Sikorski . . . came to Ms. Hanel to ask for work.. Ms. Hanel advises that she told Sikorski she could not afford to have an employee, but if she

> wanted to work on a contract basis, something could be worked out. Ms. Hanel advises that it was then agreed that Sikorski would rent a chair and 30% of the chair income would be paid to Hanel (chair rental). Sikorski paid for her own supplies, paid for her share of advertising.

There are two key pieces of evidence that lead me to conclude that Sikorski joined Hanel under the arrangement described above. Sikorski's daily appointment sheets were part of the material on file and were presented in evidence. The Determination contains the following comment about those appointment sheets:

> Sikorski provided daily appointment sheets, showing on a daily basis what money she made and what money was paid to Hanel.

Sikorski said in her evidence that the calculations of how much money was made and how much was owed for "chair rental" was calculated and paid on a daily basis. The daily appointment sheet for the week commencing May 20, 1997 and ending May 24, 1997 shows there were such calculations made for each day in that week. The entry for May 20 identifies each of the components of the calculation made on that day:

Total Brought in	92.70	
30%	-27.80	*chair rental*
Take Home	$64.90	

There are elements of the calculations made during the first week that also confirm the entries were made on a daily basis. That being the case, the agreement that Sikorski pay chair rental of 30% was in place and operating from her first day of work, May 20, as Hanel said during the investigation, and not one week after she started, as Sikorski says. There is also an invoice for $32.00 from the OK News dated May 22, 1997 for advertising. On the face of the invoice it shows that Hanel and Sikorski each paid for ½ of the amount of the invoice. That is consistent with the agreement Hanel says existed as of May 20 and inconsistent with Sikorski's assertion that she was an "employee" at that time.

The second area of dispute relates to the number of hours Sikorski worked each day. Sikorski said in her complaint, in her reply to the appeal and in her evidence that she worked every day 9:00 am to 5:00 pm, Tuesday to Saturday. I disbelieve her. Not only is that assertion inconsistent with her own daily appointment sheets, but her evidence under oath was internally inconsistent with that assertion. That assertion was also contradicted by every witness called on behalf of Hanel and while I appreciate that none of the witnesses had the opportunity to observe Sikorski on a regular or ongoing basis, cumulatively their evidence addresses a substantial portion of the time she alleges she was in the salon.

Ian Laing, the former boyfriend of Hanel, testified that during the relevant period (May 20, 1997 to May 23, 1998, Tuesday to Saturday, 9:00 am to 5:00 pm) he would visit the shop 2 or 3 times a month and on several of those occasions Sikorski was not present in the salon when he visited. Betty Wiedeman, a friend of Hanel and a client at the salon, testified that she recalls one occasion when she was in the salon and observed Sikorski leaving at about 3:30 to 4:00 pm. She asked Hanel how Sikorski could leave like that and Hanel replied to the effect that she could do that because she just rented the chair. Rosemary Anne Caple is the proprietor of Petals Professional Skin Care. During the relevant period she occupied space in the Country Hair Shop under an arrangement of her own with Hanel. She was present in the salon, attending to her own business, from Wednesday to Saturday from 10:00 am to about 4:30 or 5:00 pm (except Thursday when she was there from 1:00 to 6:00 pm). While she did not have details, she was able to recall occasions when Sikorski was not present in the salon during the times Sikorski said she was. She described Sikorski as a being pretty conscientious, but said she seemed to come and go as she pleased. She recalls answering the phone and booking appointments for Sikorski when Sikorski was not there. Dolly Savage is Hanel's mother. She testified that she regularly attended the shop 2 to 3 times a week (except for a period of time in April and May, 1998 when her husband was seriously ill), either from 10-12 am or after 1:30 pm and recalls several occasions asking Hanel where Sikorski was. Hanel often told her she had gone home or had gone to do a Welcome Wagon. Mrs. Savage also testified that the "Contract of Service", to which I will refer in more detail later, was typed up by Sikorski. Dorothy Roy, a friend of Hanel, testified that she was at the salon almost every day after her work, which because of her flexible schedule, could have been anytime from 2:00 pm to 4:30 pm and occasionally she was at the salon in the morning before 9:00 am. She assisted Hanel with some of the work in the salon. She said there were many times that Sikorski was not there. Lois Knorr, a friend of Hanel, testified that she would regularly visit Hanel when the salon was still at the old location, as her house was located near the salon. She continued to visit after the salon was moved to its new location in October, 1997, although not as frequently. She said there were many times when she was there that Sikorski was not. I also received a written statement from Tara Kandulski, who was employed to work in the salon on Saturdays. She said there were a number of times when Sikorski left the shop for different reasons. Independently, I would not give particular weight to this written statement. It does, however, add one more measure to the *viva voce* evidence.

Additionally, the daily appointment sheets belonging to Sikorski are not consistent with her claim. Notwithstanding Sikorski's denial to the investigating officer, she reluctantly agreed in cross-examination that a line through hours on the sheets meant she was not available, although, she added, she might still have been at the salon, "just not available". That qualification makes no sense. Rather, I accept that a line drawn through hours on the sheets indicated Sikorski was not available because she was not there. Many of the sheets show lines through hours, representing Sikorski's absence during periods of time she says she was at the salon working. Most show she was unavailable after 4:30 pm. The sheets also show she was regularly unavailable on either a Wednesday or Thursday

morning. She explained these absences as part of an arrangement between her and Hanel where she would work late on that day, while Hanel worked late on another day. On the day she worked late, she says she arrived sometime between 11:00 am and 1:00 pm. She then stated that on those days she still put in her 8 hours, working until 9:00 pm if she had not arrived until 1:00 pm. I have three problems with that evidence. First, there is nothing in her daily appointment sheets that show she received any clients after 6:00 pm on any of the days she came in late. Second, it represents a significant departure from what she told the investigating officer and what she gave in her direct evidence. Third, on most of the days she came in late her sheets show a line to 1:00 pm and another from 7:00 pm. This suggests that even when she set her schedule, Sikorski never intended to be available for more than 6 hours on that day.

The third area of dispute relates to whether Sikorski paid 30% of daily earnings as "chair rental" or whether she paid a monthly rental. I conclude she did both at different times during her employment at the salon. A document, dated May 20, 1997 and titled "Contract of Service" was introduced. As I stated above, Mrs. Savage said this document was typed by Sikorski. This was not challenged by her. While the document is dated May 20, 1997, it is apparent on its face that it was created sometime after October 31, 1997, probably in November, 1997. The second paragraph of the document states:

> The first contract is for a maximum of six months starting May 20, 1997 to October 31, 1997, at a cost of $2400.00 for the chair rental, for that period of time.

The amount of $2400.00 very closely approximates the amount that Sikorski had spent up to October 31, 1997 for chair rental at 30% of daily earnings. Another paragraph of the document says:

> The revised contract starting November 1, 1997, and continuing until October 31, 1998. AUDREE SIKORSKI agrees to pay COUNTRY HAIR SHOP AND LORA HANEL $275.00 per month for the rental of said chair.

Sikorski says she paid Hanel 30% of daily earnings throughout the time she was at the salon. I do not accept her evidence. Two receipts were introduced, one dated Nov. 30/97, the other dated Dec, 31/97, both acknowledging payment of $275.00 from "Hair-itage (Audree Sikorski)" for "rental of Chair on Contract at Country Hair Shop (& owner Lora Hanel)" for November and December. The cheque number are shown, as #193 and #197, respectively. Sikorski's explanation for those cheques is found in her reply to the appeal:

> . . . when, I did not at the end of the day, have enough cash to pay Lora Hanel, she would suggest that I make up the difference at the end of the month, with a cheque. Which is what I did.. That is the reason that I

> issued Lora Hanel a cheque for (#193 on November 30, 1997), (#197, on December 31, 1997).

The fact that the "difference" for the first two consecutive months following the signing of the contract is exactly $275.00, the amount of the monthly rental, is simply too improbable to allow me to accept the above explanation. Add to that improbability the fact that Hanel deposited another cheque for $275.00 on February 2, 1998 and the above explanation becomes incredible. Also, there is nothing on any of the sheets for those months, indicating only part of the 30% chair rental had been paid or indicating what amount, if any, was unpaid and accumulating from day to day. Sikorski said the sheets were the only record she kept of her daily earnings. If those sheets did not show amounts unpaid or amounts accumulating, how would she, or for that matter Hanel, have known how much was payable by her at month's end?

Neither do I accept that Sikorski was, in her words, "made" to sign the contract. The change from 30% of daily earnings to $275.00 a month was an overall reduction in the rental for Sikorski. I doubt she had to be forced to sign. In fact, she typed it up for both to sign and both had an interest in having a written contract.

ANALYSIS

There is no basis for changing the conclusion of the Director that Sikorski was an employee for the purposes of the *Act*. The fundamental character of the relationship between Hanel and Sikorski remains unchanged by the factual analysis contained in this decision. The *Act* defines employee and employer as follows:

> ***"employee"*** *includes*
>
> > *(a) a person, including a deceased person, receiving or entitled to wages for work performed for another,*
> >
> > *(b) a person the 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;*

Those definitions are broad and have been interpreted and applied in a manner consistent with the nature and objectives of the *Act*. Simply, the *Act* is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.). I agree with the following comment from *Machtinger v. HOJ Industries Ltd., supra*, that:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

In this case, there are sufficient elements of control and direction to justify a conclusion that Hanel is an employer under the *Act*. There are aspects of the work done by Sikorski and the manner in which it was done to justify a conclusion that Sikorski was an employee of Hanel for the purposes of the *Act*.

Even though I have agreed that Sikorski was an employee of Hanel, that does not change the actual relationship between the two. It is clear that Sikorski joined Hanel in the salon with the idea of developing and servicing her own clientele and, for the most part, she did that. I do not find there was a significant degree of control by Hanel over the hours of work performed by Sikorski. She was not tied to Hanel's clients nor to an 8 hour day or 5 day week. She was free to come and go and I find she often exercised that freedom. Accordingly, the conclusion of the Director relating to the number of hours for which Sikorski is entitled to wages cannot stand.

On the question of whether the appellants have established that the amount of compensation ordered to be paid was wrong, I conclude they have. The Determination seems to rely on the assertions Sikorski made to the investigating officer about her hours of work. If it is not already clear, I find her assertions to be unreliable. There may be other material that led to the conclusion found in the Determination, but that is not evident on the face of the Determination. Under Section 115(1), I have a number of options available. That provision reads:

115. (1) After considering the appeal, the tribunal may, by order,

> *(a) confirm, vary or cancel the determination under appeal, or*
>
> *(b) refer the matter back to the director.*

In this case, I have decided to cancel the Determination. My reasoning for doing so lies in the requirements of Section 81(1)(a) of the *Act*, which states:

> *81. (1) On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:*
>
> *(a) the reasons for the determination;*

The Determination does an adequate job of providing the reasons for reaching the conclusion that Sikorski was an employee. There was, however, more than one issue that had to be addressed during the investigation. The factual issue of the hours of work was joined during the investigation. Under the "Employer's Position", the Determination states:

> She [Hanel} states that Sikorski also worked for Welcome Wagon and that she did not work eight hours a day, five days a week.

Under the "Complainant's Position", it states:

> Sikorski's position is that she worked Tuesday through Saturday from 9.00 AM to 5.00 PM.

The Determination contains no reasons for reaching the conclusion that Sikorski was entitled to be paid based 40 hours a week. That reasoning was required in order to comply with Section 81(1)(a). The Tribunal's approach to Determinations that do not comply with the above statutory element is to cancel and that approach will be applied here.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated November 30, 1998 be canceled.

David Stevenson, Adjudicator
Employment Standards Tribunal