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 -

Descheneaux Recruitment Services Ltd.
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No: 1999/706

DATE OF HEARING: January 31, 2000

DATE OF DECISION: March 16, 2000

DECISION

APPEARANCES:

Pat Descheneaux	for the employer
Doug Reid	for the employer
Dawn Copeland	for herself
No one	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by the employer, Descheneaux Recruitment Services Ltd., from a Determination dated October 27, 1999. That Determination required the employer to pay vacation pay, minimum wage, compensation for length of service and statutory holiday pay in the amount of $4,964.70 including interest to the complainant.

ISSUE(S) TO BE DECIDED

The issue under appeal is the finding by the Director's Delegate that the complainant, Dawn Copeland, was an employee rather than an independent contractor. The appellant does not dispute the Delegate's calculation of monies owing if the appeal is unsuccessful.

FACTS

The appellant, Descheneaux Recruitment Services Ltd., is an employment agency which specializes in recruiting permanent placements in the insurance industry. The appellant, Dawn Copeland, worked for the employer from November 1997 through February 10, 1999 as a recruitment consultant. Her remuneration was based on a 50% commission of the fee that the employer charged to clients for successful placements.

The employer took the position that from November 19, 1997 to January 1, 1999 the complainant was an independent contractor. The employer relied upon a contract of employment that was signed by the parties on November 9, 1997. That contract of employment provided that the employer was agreeable to the complainant's request to be paid on a "contract basis as a free agent". The employer then stated that it would be absolved of any responsibility for the collection of Income Tax, Canada Pension, Unemployment Insurance and Workers' Compensation. The complainant would be required, at her own request, to pay those accounts. The contract purported to have an effective date of November 19, 1997.

On January 1, 1999 the employer commenced making payroll deductions pursuant to Revenue Canada directives. The employer's evidence indicated that it had received a bulletin from Revenue Canada outlining the difference between employees and contract workers. Based on that bulletin the employer reasoned that the employment relationship it had with the complainant resembled that of an employee rather than an independent contractor. Both the employer and the complainant testified that the only difference in the terms and conditions of employment after January 1, 1999 was the fact that the complainant was placed on a twice monthly payroll with statutory deductions being taken from her cheques.

As stated previously the issue in this case is whether the complainant is an employee or an independent contractor. Mr. Reid on behalf of the employer candidly stated that if the Tribunal found that the complainant was an employee the employer took no "issue with the numbers". I took that to mean that the employer was not contesting the Delegate's calculation of damages if the complainant is found to be an employee.

In making that decision I consider the tests of control, integration, economic reality and payment. Under the control test the evidence showed that the employer provided office space, a computer, the databases, telephones and office supplies including business cards. The complainant was expected to report to work daily Monday through Friday. She was expected to report in the morning and to work through the afternoon. I recognize that there was some variation in hours to meet specific assignments but I do not accept that these variations amounted to the setting of an independent schedule by the complainant.

The employer also provided the complainant with some leads. The complainant was expected to develop her own client base; however, the development of this client base was supervised by the employer. Although the complainant had some recruitment experience in areas outside the insurance industry the fact of the matter is that all but two of her placements were in the insurance industry. The employer required the complainant to write letters in a certain format and to compile weekly sales reports. The employer required the complainant to structure her files in a manner set by the employer. The employer would also prioritize interviews for the complainant.

Evidence was lead that on one occasion the employer took great exception to the manner in which the complainant handled a placement. The complainant, after making a placement, had redirected the candidate to another insurance agency. The employer viewed this occurrence as unethical and would not tolerate this method of recruiting. The employer personally intervened in the matter and required the complainant to write a letter of apology to the insurance agency where the candidate had been originally placed. The writing of this letter was supervised by the employer. Indeed the employer candidly stated that this incident caused her to reflect on her need to control the complainant and that this, along with Revenue Canada's bulletin, were factors which lead the employer to place the complainant on payroll in January 1999. The employer candidly admits that by January 1999 it had taken the position that the complainant was an employee.

I view the above factors as an indication that there was a traditional master and servant relationship between these parties. The employer had personally hired the complainant; had provided office space and supplies; had set the hours of work and the manner in which work was to be completed; and, finally, had exercised some degree of discipline over the complainant.

I turn now to the test of integration. The complainant made placements for Descheneaux Recruitment Services Ltd. exclusively. The complainant presented herself both to clients and candidates as a representative of the employer. The complainant's single source of income for the period was from Descheneaux Recruitment Services Ltd. She did not recruit or perform duties for any other employer.

It was argued that the complainant could have hired an assistant to work with her had she wished. However, that was never discussed between the parties. Furthermore, I accept the complainant's evidence that even if there had been sufficient work for a second person the employer would not have allowed another person to work on the premises or have access to the databases without the employer's express approval. Under the integration test I find that the complainant performed work that was wholly involved with the operation of Descheneaux Recruitment Services Ltd.

I turn now to the economic reality test. The evidence disclosed that the complainant worked on a 50% commission basis. She was paid her commission when the employer received payment on its invoice to the client. It should be noted that the complainant did no invoicing – all invoices to the clients were submitted by Descheneaux Recruitment Services Ltd. The fact that the complainant worked on a commission basis is not definitive of the employment relationship. I view her remuneration on a commission basis as being an incentive for greater production within the employment relationship rather than a chance for greater profit. Similarly, in view of the fact that the employer was providing the capital equipment and the office space I do not perceive the complainant, even if she is bearing her own telephone and vehicle costs, as running an operational (or capital) risk of loss. I view the economic reality of this relationship as one of the complainant working for the employer rather than the complainant operating a business on her own behalf.

I turn finally to look at the specific result of the relationship between the complainant and this employer. I conclude from the evidence that the complainant was hired to perform general recruitment duties within a professional office surrounding. She reported daily to the employer's premises. She was trained for and given the assignment of recruiting employees in the insurance industry. She did this on an ongoing basis as opposed to a specific assignment.

The employer argues that the employment letter which was signed by both parties dated November 7, 1997 shows that the parties intended to enter an independent contractor relationship. I do not accept that argument for the reasons that I have set out above. Furthermore, the fact that the parties may agree that the employee would be responsible for statutory deductions including WCB payments does not provide a definitive answer to the question of the status of the employment relationship. The parties are still subject to the provisions of the *Act*. Specifically, Section 4 of the *Act* states that:

> "The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69."

Parties are not allowed to contract out of the *Act*. This includes not only Section 4 but also the interpretations that have been placed on the definition of employee and wages under the *Act*. For these reasons I find that the complainant was an employee rather than an independent contractor. The employer is therefore obliged to pay the amounts set out in the Determination.

ORDER

The Determination dated October 27, 1999 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal