

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 -

Zeeba Hair & Body Image Inc.

(“Company”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Richard S. Longpre

FILE NO.: 98/007

DATE OF DECISION: April 2, 1998

DECISION

WRITTEN SUBMISSIONS BY

Ali Shamei	for the Company
Mehdi Shamei	for the Company
Anjna Puri	for herself

OVERVIEW

This is an appeal filed by Zeeba Hair & Body Image Inc. (the “Company”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). The Company is appealing a Determination dated December 10, 1997 (ER# 75-205) issued by a Delegate of the Director of Employment Standards. The Determination found that Ms. Anjna Puri was an employee of the Company. The Company owed Puri \$356.77 in wages from her employment with the Company.

ISSUE TO BE DECIDED

Did the Delegate error in finding that Puri was an employee of Zeeba Hair & Body Image Inc.?

FACTS

Puri worked at the Company's location in Surrey as an aesthetician. She provided her own electrolysis equipment. The rest of the supplies belonged to the Company. The Company's receptionist booked Puri's clients. Puri also did facials, pedicures, waxing and manicures on occasion. She did not come in when there were no clients. Puri received 50% off the charge to the client.

The Company's position before the Delegate was that Puri was self-employed and owned her own equipment. She set her own hours of work. The Company said Puri's hours of work record were not kept as she was not an employee. Puri had a contract with a prior manager. She owed the Company for supplies ordered and paid for on her behalf. Because she was not an employee, Puri was not entitled to minimum wage.

The Delegate never received the contract between Puri and the former manager. The Delegate found that supplies ordered from ETB Supplies Ltd. were invoiced to the Company and paid by the Company. With respect to hours worked, the Determination reads:

The employer stated that he did not have a record of the hours worked but later argued the appointment book was a record of the hours that she worked. The appointment book only shows the appointments that were

booked but not the time work started or finished. I do not accept the appointment book as a record of hours worked. I find that the record of hours worked kept by Puri to be credible. (p.2)

The Delegate found Puri to be an employee of the Company for the following reasons. The Company had paid Puri vacation pay and had taken tax deductions from her pay. The Company set Puri's hours of work as the Company's receptionist booked her clients. The Delegate concluded had that Puri was integrated into the Company's business, had no ability to make a profit or loss as she was paid a commission and the Company had the right to terminate Puri's employment. The Determination went on to read:

Commissioned salespeople are also entitled to earn minimum wage. Where the salesperson's commissions do not total at least the minimum wage for the number of hours worked in a given period, the employer is obliged to pay the difference between the commission earned and the minimum wage.

The Delegate found that the Company had contravened Sections 16, 18(2), 34(2) and 58(3) of the *Act*. She ordered the Company to pay Puri \$356.77

ANALYSIS

The Company made two submissions in support of its appeal. Both submission noted that Puri supplied her own electrolysis equipment and supplies. She made her time available known to the receptionist and was booked accordingly. Her hours worked were recorded in the appointment book. They were not recorded in the "punch in/out" computer system for employee attendance at work. The Company's submission reads:

All her appointments were made through our reception in the common reception book which is used for all staff, self-employed as well as employees. She came and left in order to accommodate our clients as well as clients of similar service somewhere else through appointment driven schedule. She occasionally called to find out if there is any appointments in order to set her schedule, she was also given the opportunity to do some other services in order to make her days as she occasionally complaint scout relty (sic) of electrolysis clients.

The Company's submissions when on to note that Puri purchased supplies from ETB Supplies: to keep its account, the Company paid the bill. The Company also says that it made a mistake with vacation pay. The Company notes that Puri could have brought this to its attention. The Company noted several employees and ex-employees who would support its position.

I start with the scope of appeal under section 112 of the *Act*. The Delegate made an investigation into Puri's complaint and followed with a Determination. The Determination stands as a binding decision. The appellant bears the onus to establish an error in the Delegate's Determination.

Numerous decisions by the Tribunal have emphasized the limited grounds of appeal. There are exceptions to that limitation but the Tribunal has consistently declined to rehear the same evidence. The purpose is not to conduct a hearing into the evidence, make different findings of fact and reach a different conclusion. With respect, the Company's appeal asks the Tribunal to do just that. The evidence relied on by the Company was before the Delegate when she made her Determination. Her findings of fact were based on assessing the Company's evidence against the evidence given by Puri. I see no basis to conduct a re-hearing into the Delegate's findings of fact.

In many circumstances, the Company and the employees themselves, use the term "contractor" in defining an employment relationship. The Tribunal does not ignore that characterization but it does not decide the issue. In determining whether a person was an employee or contractor under the *Act*, several factors are examined: the employer's control over the work, ownership of tools, chance of profit and loss, remuneration, ability to discipline or dismiss, the intention of the parties and the integration of the person into the employer's business. The Delegate applied these factors.

The Company is correct in pointing out that some of these factors support its argument, i.e. the ownership of equipment. However, most of these factors indicate an employment relationship. Most significant was Puri's integration into the Company's day to day operations. Puri was paid a percentage of the money she brought into the Company: payment by commission was not determinative. The Delegate found that the Company ordered Puri's supplies, the supplier billed the Company and the Company paid the bills. Further, the Company did not dispute the Delegate's finding that she performed work normally done by other employees. On balance the Delegate found the Puri had an employment relationship with the Company. I will not second guess that Determination. The Company's appeal does not succeed.

ORDER

Pursuant to section 115 of the *Employment Standards Act*, the Delegate's Determination, dated December 10, 1998, is confirmed. The Company is directed to pay Puri \$356.77 plus interest.

Richard S. Longpre
Adjudicator
Employment Standards Tribunal