

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 -

Rose Mariana Robb and Helen Cahill
Operating Quick Takes Photography Inc.
("Robb" & "Cahill")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 96/170 and 96/193

DATE OF DECISION: June 24, 1996

DECISION

OVERVIEW

This is an appeal by Rose Mariana Elena Robb (“Robb”) and Helen Cahill (“Cahill”), Directors/Officers of Quick Takes Photography Inc. under Section 112 of the *Employment Standards Act* (the “Act”) against Determination No. DDET 000128 and Determination No. DDET 00129. The Determinations were issued by a delegate of the Director of Employment Standards on February 22, 1996. In this appeal Robb and Cahill claim no wages are owed to Natalie Chiasson (“Chiasson”).

The Director’s delegate determined, following his investigation, that wages were owed to Chiasson as the cheques she had received were uncashable (NSF) in contravention of Sections 17 an 18 of the *Act*.

I have completed my review of the information provided on these appeals and have decided to confirm the Determinations.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Chiasson is an employee of Quick Takes.

FACTS

Chiasson worked for Quick Takes Photography Inc. (“Quick Takes”) as a photographer from June 14, 1995 to July 30, 1995.

There is no dispute that Chiasson received NSF cheques from Quick Takes.

Quick Takes is no longer in operation. In her appeal, Cahill, who is the mother of Robb, states that the company is insolvent.

It is the position of Cahill and Robb that Chiasson is not owed any wages because she was not an employee of Quick Takes. In their appeals Cahill and Robb state that Chiasson was a self-employed free lance photographer who had a contract to do tourist photos. She broke her contract by quitting. This action resulted in lost revenues and contributed to the collapse of the company. Hence, the NSF cheques.

On April 22, 1996, the Tribunal received a letter from Cahill which stated that Robb would be sending in all the necessary documentation for their case.

On April 27, 1996 and April 30, 1996, Robb forwarded submissions to the Tribunal in which she reiterated that Quick Takes suffered a significant loss of revenue when Chiasson quit her job prior to completing the whole season doing photos on the Royal Hudson train and the MV Britannia cruise ship. The end result was that the company went out of business at the end of September, 1995 and there were no funds available to pay Chiasson. In her April 27, 1996 submission Robb also makes the following statements: "...Chiasson presented herself as a free lance photographer with her own business card and list of other clients when she came to Quick Takes. She came to two interviews and was selected with two other photographers to take pictures...". Robb also enclosed a copy of Chiasson's contract (which is unsigned) and a statement from Christina Bell ("Bell") who managed the start-up of their Vancouver operation in 1995.

The contract, which is for the period June 14 - September 20, 1995, indicates that the photographer is responsible for photographing passengers and offering the pictures for sale, getting re-orders printed and ready for mailing out, providing navy slacks, skirt, or walking blue shorts and footwear to go with uniforms, and keeping camera bags, equipment and uniforms presentable. Quick Takes is responsible for providing camera equipment, camera bags, uniforms and name tags, and for paying contracted fees and bonuses. The contract ends by stating that Quick Takes does not deduct CPP or Income Tax from summer contract photographers.

In her statement, Bell writes that she assisted Robb during the selection of the three photographers for the 1995 tourist season. She states that the photographer positions were offered to all applicants as contract positions and they were to be paid fees as freelancers, without deductions being taken from the fees. Those hired, which included Chiasson, indicated they were available to work the entire season. They were all presented with contracts to sign and to the best of her recollection all three signed their contracts.

On May 2, 1996, the Director's delegate filed a submission stating that by applying the Fourfold and Integrity tests it was his conclusion that Chiasson was an employee of Quick Takes. His reasons are as follows:

Control: the employer set the hours of work, provided supervision, and maintained control of the monies paid by the clients for the photographic services rendered by requiring the photographer to deposit all money collected during the day to Quick Takes bank account.

Ownership of Tools: the employer provided the uniform, camera, film, and other miscellaneous supplies.

Chance of Profit: other than the agreed remuneration, weekly salary plus commission, there was no chance of profit.

Risk of loss: no evidence that there was any risk of loss incurred by the complainant.

Integrity: The service that was being provided by the complainant was an integral part of the overall business operation conducted by Quick Takes.

The delegate's submission was forwarded to Robb on May 13, 1996. The letter invited her to make a written reply. No reply was received by the Tribunal.

ANALYSIS

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, and
- (e) A person who has a right of recall.

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 degree of direction and control which the employer has in a relationship is one of the main factors in establishing an employment relationship. This is part of the four-fold test that is often used in determining whether a person is an employee or an independent contractor. The "control" portion of the test asks whether an employer has direction and control over a person and whether an employer sets the time, place and way in which the work is done.

Chiasson was hired by Quick Takes and Quick Takes set the fee schedule. The Director's delegate states that Quick Takes, as well, set Chiasson's hours of work, provided supervision and controlled the monies paid by clients to Chiasson. This was not disputed by the appellants. These factors indicate an employee-employer relationship existed between Quick Takes and Chiasson.

The four-fold test also examines the ownership of tools, and whether there is a chance of profit or risk of loss, and whether the individual's work is an integral part of the business operations. In this case, Quick Takes provided the main tools such as a uniform, camera, bags and name tags. There was no evidence presented to show that Chiasson had a chance to make a profit or was in a position to suffer a loss given she received set fees and bonuses. Finally, the work performed by Chiasson was an integral part of, rather than incidental to, the business of Quick Takes. The

work provided by Chiasson

- photographing tourists - was central to the business of Quick Takes. Again, the foregoing factors suggest an employee-employer relationship.

It is conceded that other factors are suggestive of an independent contractor relationship, such as the absence of statutory deductions, and the claim that Chiasson had her own business cards and client lists. On balance, however these factors do not create independent contractor status out of the parties' employer-employee relationship.

Given the above, I conclude that Chiasson was an employee of Quick Takes and is owed wages in the amount listed on the Determinations.

ORDER

Pursuant to Section 115 of the Act I order that Determination No. DDET 000128 and Determination No. DDET 00129 be confirmed.

Norma Edelman
Registrar
Employment Standards Tribunal

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