

An appeal

- by -

Bay Technology Corporation  
("Bay Technology")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** April D. Katz

**FILE No.:** 2001/46

**DATE OF DECISION:** March 26, 2001

## DECISION

### SUBMISSIONS:

Andrew Lund	on behalf of Bay Technology Corporation
Kelly Wicks	on her own behalf
Ivy Hallam	on behalf of the Director

### OVERVIEW

In a Determination dated December 14, 2000, the Director of Employment Standards, the “Director”, found that the Employer, Bay Technology Corporation (“Bay Technology”), owed Kelly Wicks (“Wicks”) \$5,064.94 in wages, vacation pay and interest.

### ISSUE

Did the Director err in finding that Wicks was an employee and not an independent contractor?

### ARGUMENT

Bay Technology argues Wicks was an independent contractor working under an agreement for services and was not an employee. Wicks argues that she worked as an employee and entered into the contract at Bay Technology’s request. The Director’s Delegate argues that the appeal does not reveal any new evidence that was not considered in the Determination and that no error was made in the Determination.

### FACTS

Wicks worked for Bay Technology from November 3, 1999 until May 17, 2000 as the sole office staff with a title of Office Manager. She worked from Monday to Friday in the office from 8:30 AM until 4:00 PM. Bay Technology provided her with business cards and office supplies to perform her work.

On February 7, 2000 Wicks on behalf of her private company called “J-Kat Enterprises” signed a document titled “Independent Contractor Agreement” with “A. Lund” on behalf of Bay Technology Corporation.

Under the Agreement Clause 1. Provides

“Subject to the terms and conditions herein, Bay shall retain the Independent Contractor on a non-exclusive basis to promote, Demonstrate, solicit, enter sales of, install and service, Bay products and services for its:

\_\_\_\_\_ Residential \_\_\_\_\_ Small Commercial (under \$5000.00)  
    X     Other (Please Specify) Office Work. Projects and the Independent Contractor agrees to perform said services, Except as provided to the contrary herein, unless otherwise authorized, Independent Contractor shall refrain from selling to Institutions as described in attached Schedule ‘A’.”

Clause 6 provides as follows.

“The Independent Contractor’s days and hours of performing such services are within the sole discretion of Independent Contractor.”

The Director’s Delegate found that Wicks had no discretion about the hours she worked. The Director’s Delegate found that Bay Technology provided all the tools required for Wicks to perform her work. The Director’s Delegate found that Wicks had no risk of loss or share of profit in the business. The Determination concluded that Wicks was an employee and not an independent contractor. Bay Technology had not deducted anything for employment insurance or taxes from Wicks’ earnings and is appealing an assessment from the Revenue Agency.

## **ANALYSIS**

The onus is on the appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled. To be successful the evidence from the appellant must demonstrate some error in the Determination, either in the facts accepted, the factual conclusions reached or in the Director’s analysis of the applicable law.

## **EMPLOYEE OR CONTRACTOR**

This appeal is based on Bay Technology’s assertion that Wicks was an independent contractor. If Wicks was an independent contractor and not an employee, then the *Employment Standards Act (the Act)* has no application and the Tribunal has no jurisdiction.

The Tribunal has had many appeals where the issue is whether the claimant is an employee. The Tribunal has reviewed many court decisions to develop criteria for analyzing this question.

The first place to look is the definitions the *Act*. Section 1 of the Act defines the terms "employee", "employer", and "work". Those definitions are 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, ... .

"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.

"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

Section 8 of the British Columbia *Interpretation Act* requires that the definitions be given a broad and liberal interpretation which was confirmed in the B. C. Court of Appeal in *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170];

"the definitions in the statute of "employee" and "employer" use the word "includes" rather than "means". The word "includes" connotes a definition which is not exhaustive. Its use indicates that the legislature casts a wide net to cover a variety of circumstances."

In *Castlegar Taxi v. Director of Employment Standards* (1988) 58 BCLR (2d) 341, the B.C. Supreme Court noted:

"The courts, in determining the nature of a labour relationship, have looked beyond the language used by the parties in the contract and have, instead, assessed the nature of their daily relationship."

Section 4 of the *Act* specifically prohibits any attempt to waive the minimum requirements of the *Act* through or by agreement.

"4. 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.

Various tests have been developed as an aid to deciding whether a person is or is not an independent contractor. There is "control test", the "Four-fold" test (also known as the "four-in-one test") applied by *Lord Wright in Montreal Locomotive Works Ltd.*, (1947) 1 D.L.R. 161 (P.C.), the "organizational test" (also known as the "integration test") of Lord Denning, as he later became, the "economic reality test" and the "specific result test", to name some of the more important ones.

"The observations of Lord Wright, of Denning, L.J., and of the judges of the Supreme Court of the U.S.A. suggest that the fundamental test to be applied is this: **'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service.** No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man (or woman) performing the services provides his (or her) own equipment, whether he (or she) hires his (or her) own helpers, what degree of financial risk he (or she) takes, what degree of responsibility for investment and management he (or she) has, and whether and how far he (or she) has an opportunity of profiting from sound management in the performance of his (or her) task. The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself (or herself) to perform services for another may well be an independent contractor even though he (or she) has not entered into the contract in the course of an existing business carried on by him (or her). *Market Investigations Ltd. v. Minister of Social Security*, (1968) 3 All E.R. 732 (Q.B.D.) at 737 –738.

The Tribunal has through *Larry Leuven*, (1996) BCEST No. D136/96, and other decisions, said that it will consider any factor, which is relevant. In *Cove Yachts (1979) Ltd.*, BCEST D421/99 the Tribunal set out the following factors.

- The actual language of the contract;
- control by the employer over the "what and how" of the work;
- ownership of the means of performing the work (e.g. tools);
- chance of profit/risk of loss;

- remuneration of staff;
- right to delegate;
- the power to discipline, dismiss, and hire;
- the parties' perception of their relationship;
- the intention of the parties;
- the degree of integration between the parties; and
- if the work is a specific task or term.

Applying these criteria to the facts in this situation it appears that Wicks was employed as an office worker in November 1999 and later it was decided that she should use her home business name to enter into a contract for services. The language of the Independent Contractor Agreement speaks of 'territories' and 'sales' and does not appear to have been written for the type of work performed by Wicks.

Wicks was not an independent business person who had contracted with Bay Technology in the course of her own business. Nor was she a partner entering into the business as a joint venture.

Wicks relied totally on Bay Technology to direct her daily activities, which were always carried out by her at Bay Technology's office and not someone she designated. Her activities were within the control of Bay Technology daily. The hours were regular and prescribed and she did not have any independence about whether she came in the morning or afternoon or evening. She could not elect to work Wednesday to Sunday and not Monday and Tuesday. Bay Technology took all the risks and paid Wicks a regular wage.

Wicks did not have any staff reporting to her. She had no hiring or firing authority. All the tools and equipment Wicks used were provided by Bay Technology. The work was totally integrated into Bay Technology's business and was not independent in any way.

J-Kat Enterprises had no independent business of a contractor at Bay Technology. Based on the evidence provided by Bay Technology I conclude that Wicks was an employee within the meaning of the *Act* and confirm the Determination in this respect.

## **CONCLUSION**

Based on the evidence presented I confirm that Wicks was an employee and not an Independent Contractor. Bay Technology has failed to meet the evidentiary burden on it to support a successful appeal. The appeal is denied

**ORDER**

Pursuant to section 115 of the *Act*, the Determination dated December 14, 2000 is confirmed.

***APRIL D. KATZ***

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**April D. Katz  
Adjudicator  
Employment Standards Tribunal**