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 -

Regions Group of Companies International Trading Ltd.
("Regions")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Lorne D. Collingwood
FILE No.:	2000/005
DATE OF HEARING:	March 23, 2000
DATE OF DECISION:	April 14, 2000

DECISION

OVERVIEW

Regions Group of Companies International Trading Ltd. ("Regions", also, "the employer"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), has appealed a Determination by a delegate of the Director of Employment Standards (the "Director"). The Determination is dated December 13, 1999 and it orders Regions to pay Kimberley A. MacDonald $534.65 in wages and interest.

Underlying the Determination is the conclusion that MacDonald was at all points an employee and not ever an independent contractor. The delegate has also awarded her four hours pay for work on the 23rd of March, 1999, her last day of work. Regions, on appeal, claims that MacDonald was not always its employee and that she did not work on the 23rd of March but quit at the outset of the work day.

APPEARANCES

Cyrus Zahedi	Accountant for Regions
Kimberley MacDonald	On her own Behalf

ISSUES TO BE DECIDED

My task in this case is to decide whether the employer has or has not shown that the Determination ought to be varied or cancelled for reason of what are alleged to be two errors in fact.

FACTS

MacDonald began working for Regions on the 11th of August, 1998. She resigned her employment on the 23rd of March, 1999.

It was through Human Resources Development Canada that MacDonald learned of work at Regions. That agency posted the following job:

> Receptionist/Switchboard
> Regions Group of Companies
> 4th Floor, 900 West Hastings,
> Vancouver, B.C.
> $7.50 - $9.50/hour
> Part Time, 5 days/wk, 4 hrs/day
> Some Exp./ Good Command of English/
> Filing/ Typing Skills/
> Apply by Phone

On interviewing MacDonald, Regions offered her work as a receptionist at an hourly rate of pay but in doing so it proposed that she work on a contract basis. MacDonald understood that to mean that that Regions would not deduct income tax, CPP and EI from her pay. MacDonald agreed to that as she had been out of the country for almost two years and reckoned that her 1998 earnings were going to be so low that she would not have to pay income tax anyway.

MacDonald began work and she was soon working full time as Regions' receptionist. It provided everything that she needed for that work. It set her hours of work. It gave her instructions on what it wanted done.

Regions agrees that the relationship was one of employment after the 18th of September, 1998. That is when it began making the deductions which Revenue Canada requires. (Regions, in a letter dated January 5, 2000, appears to say that the employment started October 2, 1998 but its records show, and Cyrus Zahedi confirms, that in fact Regions began deducting income tax, CPP and EI in the pay period which ends October 2, 1998.)

Regions claims that MacDonald had total earnings of $8,897.90. The delegate has calculated that MacDonald had total earnings of $10,077. The difference is that Regions is not counting moneys earned prior to September 18, 1998 (what Regions views as money earned as an independent contractor) and the delegate's figures include pay for 12 hours of work on the 22nd and 23rd of March, 1999, whereas Regions' figure does not.

Regions does accept that MacDonald worked 8 hours on the 22nd of March, 1999. It does not accept that she is entitled to 4 hours pay for work on the 23rd. According to Regions, MacDonald on that day just came in, typed up her resignation, and quit. As far as Zahedi can remember, MacDonald handed him a copy of her letter of resignation on or about 9:30 a.m.. MacDonald tells me that she does not remember handing Zahedi a copy of her resignation and she has said that she worked approximately half a day. She claims that her point of departure is a matter of record in that the building manager made note of when she handed in her key to the bicycle room and her electronic pass card. The delegate has accepted that it was MacDonald's intention to work half a day and that she in fact worked almost half a day. I find that, as Regions has presented matters to me, it has not produced evidence that clearly shows that the delegate is wrong in her conclusions.

In the appeal documents, Regions makes much of a cheque with number 0019. It is dated April 5, 1999. It was made out to MacDonald for $292.19. MacDonald tells me that she never received the cheque and I find that Regions agrees that the cheque has not been cashed. That is all that is of importance in regard to the matter of that cheque.

ANALYSIS

Regions' appeal is that the Determination is wrong in that the delegate has treated the work which MacDonald did as a contractor as though it were work by an employee and, secondly, that it is wrong in that MacDonald quit at the outset of work on the 23rd. But as it presents matters to me, I find that it really does nothing more than allege that the relationship was not one of

employment prior to the 18th of September, 1998, and allege that the employee quit before performing any work on the 23rd. It has not provided any evidence, nor provided any argument, to challenge the conclusions of the delegate in any important way. Legally speaking, the appeal is at least frivolous and trivial if not vexatious or not in good faith. It is an appeal which may be dismissed pursuant to section 114 (1)(c) of the *Act*.

> ***114*** *(1) The tribunal may dismiss an appeal without a hearing of any kind if satisfied after examining the request that*
>
> *(c) the appeal is frivolous, vexatious or trivial or is not brought in good faith.*

Regions has not shown me that MacDonald did in fact quit at the outset of work on the 23rd of March and the Determination is therefore wrong in awarding 4 hours pay for work on the 23rd. I am given no reason to think that the delegate has erred in that respect.

And Regions has not shown me that MacDonald was not its employee prior to the 18th of September, 1998, but an independent contractor. 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.*

MacDonald squarely fits the definition of employee in that, clearly, she performed work for Regions for an hourly wage. Moreover, Regions allowed her to perform work which is normally done by an employee.

And Regions squarely fits the definition of employer. It controlled what MacDonald did in the way of work and when she did it. And it is through Regions and because of Regions that MacDonald ended up doing the work that she did prior to September 18, 1998. It interviewed her for the work. It did not contract out the job of receptionist.

The primary purpose of the *Act* is that employees receive at least basic standards of compensation and working conditions (section 2 of the *Act*). It does not matter that a person is called a

contractor. If the person is an employee then he or she is entitled to the benefits and protections of the *Act*.

I recognize that not everyone who works does so as an employee. There are people who are self-employed independent contractors. In deciding whether a person is an independent contractor or an employee, which is to say, covered by the *Act*, the Tribunal has said that it will consider the following factors:

- The actual language of the contract between the parties, if there is one;
- who has control 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;
- the 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.

One would not deduct income tax, CPP and EI from the fees charged by an independent contractor for services provided and there were not deductions for income tax, CPP and EI in this case. But I am satisfied that MacDonald was at all times an employee. There is not evidence to show that MacDonald was at any point running or attempting to run her own business. Regions had complete control over the work that she did prior to September 18, 1998, just as it did after that. It supplied the place of work and all of the tools that MacDonald used for her work. MacDonald was paid by the hour and her hours of work were established by Regions. As such there was neither chance of profit, nor possibility of loss. And MacDonald was not hired for a specific term: The relationship was to be on an ongoing basis.

I have heard the appeal by Regions and I find that the employer fails to show how the Determination is in any way in error.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated December 13, 1999 be confirmed in the amount of $534.65 and to that amount I add whatever further interest may have accrued pursuant to section 88 of the *Act*.

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Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal