

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 -

Castenmiller Holdings Inc. operating as Lassthetic Salon
("Lassthetic")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 98/84

DATE OF HEARING: April 2, 1998

DATE OF DECISION: April 23, 1998

DECISION

APPEARANCES

Margaret Castenmiller	Owner of Lassthetic Salon
Debbie Seres	Complainant
Karina Thébeau	Witness

OVERVIEW

This appeal is by Castenmiller Holdings Inc. operating as Lassthetic Salon (“Lassthetic”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) and it is against a Determination by a delegate of the Director of Employment Standards (the “Director”) dated January 19, 1998. The Determination is that Debbie Seres worked as an employee of Lassthetic and that she is owed vacation pay and statutory holiday pay as a result.

ISSUE TO BE DECIDED

At issue is the matter of whether or not Seres worked as an employee or an independent contractor. Lassthetic argues that Seres operated her own business within the salon: That she was an independent contractor who merely rented space there.

FACTS

Debbie Seres performed the services of an electrologist in the Lassthetic Salon from October 22, 1995 to April 24, 1997.

It was an advertisement in a newspaper, the “*Tri-City News*”, that led Seres to Lassthetic and Margaret Castenmiller, owner and manager of the salon. She was “hired to take over the former electrologist’s schedule”, to use Castenmiller’s words. Terms and conditions of the work were never written down. Seres did fill out an application form. It asks the question, “Why did you apply at Lassthetic Salon?”

Seres began work and Lassthetic then advertised that electrolysis was being offered as a service. Lassthetic had business cards which promoted the salon as offering electrolysis as well as aesthetic services. Castenmiller performs a variety of aesthetic services and treatments but not electrolysis. Only Seres performed electrolysis, at least initially. Seres later found other work and, from February 14, 1996 on, she worked only part-time, Tuesday and Thursday mornings. At that point Castenmiller arranged for a second electrologist to work in the salon, in the hours when Seres was unavailable.

In addition to electrolysis, Seres performed other work. She sold gift certificates, did some cleaning in the salon, answered telephones, undertook various pickups and deliveries, and performed beauty treatments other than electrolysis. There is disagreement on the extent of this other work, and whether it was required or voluntary. In the latter regard, Karina Thébeau, who also worked as an electrologist in the salon in the relevant period, testifies that the work was expected of Seres and herself, and that Castenmiller ordered it performed on occasion. No hard evidence to the contrary, I find that Seres was allowed to think that such work was required of her. I am unable to determine whether there was a significant amount of the work, however. It is clearly electrolysis that Seres performed in the main.

Beyond her work at Lassthetic, Seres performed electrolysis at home. That is the extent of the electrolysis which was performed by her. The work at home was limited to a few friends and very minor in nature. There was no operating of a business out of her home.

Seres owned her own electrolysis machine and it that machine which was used for her work at Lassthetic. She was paid another 5 percent of the fee for electrolysis because she owned her own machine. Seres also provided tweezers and her own uniforms. Lassthetic provided her with a bed, a stool, magnifying lamp, and sterilising equipment. It also supplied disposable items which are required by an electrologist, including filaments (disposable needles), alcohol, lotions, and latex gloves.

Lassthetic paid Seres 55 percent of fees charged customers for electrolysis. Lassthetic kept the rest as rent and as payment for the services and products which it provided Seres. There was no deduction for income tax or CPP premiums. Initially, there was no paying of EI premiums either but that changed when Revenue Canada decided that the relationship between Seres and Lassthetic in the period October 24, 1995 to May 30, 1996 was employer/employee and that the employment was insurable.

Much changed with that Revenue Canada decision. Castenmiller proceeded to appeal the decision and argued that Seres was an independent contractor. Hearing that they were considered self-employed by Castenmiller, Seres and other workers decided that they would as a result just leave the salon in periods when no appointments were booked. Castenmiller complains of losing control and says that the salon lost walk-in business and its client-base suffered. It was during this period of turmoil that Seres gave Castenmiller a note, undated, which states, "Herewith, I ... declare that I am aware that I am contracted by Lassthetic Salon since 26 October, 1995, on a commission basis, that I am self-employed and I receive my Percentages Gross. I am responsible for my own Income Tax deductions and other premiums."

Castenmiller sought to re-establish her control over Seres through what is called the "Commission Agreement". It refers to Seres as the contractor and specifies that the contractor "will attend (the salon) during the hours established by the salon", "the hours ... shall not be changed unless agreed in writing", and "the contractor shall ... devote her whole time and attention to the business of the Salon and shall not without consent in

writing of the Salon engage in any other business or occupation or become a director, manager or agent of any other firm or individual”. Seres refused to sign that agreement. She did agree that she would “not start her own business or take any clients away from Lassthetic Salon until a contract could be signed which is mutually acceptable”. A note dated June 27, 1996 confirms that.

With Seres refusing to sign the commission agreement, Castenmiller eventually changed course and proposed terms and conditions of employment. Seres misunderstood her proposal as calling for work at the minimum wage. She said she would not work on that basis. In the end, Castenmiller decided that she had no alternative but to dismiss Seres. A letter dated April 23, 1997, set May 6, 1997 as her “last day of employment”.

ANALYSIS

The *Act* has no application in the absence of an employer-employee relationship. Was Seres an employee? Of paramount importance is the *Act*.

In section 1 of the *Act* are definitions of “employee”, “employer”, and “work”. They are as follows:

“employee” includes:

- (a) *a person, including a deceased person, receiving or entitled to wages for work performed for another, (my emphasis)*
- (b) *a person an employer allows, directly or indirectly, to perform the work normally performed by an employee, (my emphasis)*
- (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;*

“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.

The above definitions are to be given a liberal interpretation. That is the view of the BC Court of Appeal. In *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170 the court noted,

“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.”

The matter of whether or not a person worked or is working as an employee is not the most straightforward of matters [*Hospital Employees' Union, Local 180 v. Cranbrook & District Hospital*, (1975) 1 Can. L.R.B.R. 42 at 50].

The difficulty is that there is no single element in the normal makeup of an employee which is decisive, and which would tell us exactly what point of similarity is the one which counts. Normally, these various elements all go together but it is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee But while the legal conception of an employee can be stretched a fair distance, ultimately there must be some limits. It cannot encompass individuals who are in every respect essentially independent of the supposed employer.

The facts in this particular case are that, for Revenue Canada purposes, Seres presented herself as self-employed. But I must decide whether or not she worked as an employee as the term is defined by the *Act*. That is because the terms of the *Act* are minimum requirements and an agreement to waive terms of the *Act* is of no effect (section 4 of the *Act*).

Various tests are of aid in deciding whether a relationship is one of employment. As set out in the decision of the Tribunal, *Larry Leuven* (1996) BCEST No. D136/96, the Tribunal will consider several factors including:

- Control by the employer over the work;
- ownership of tools;
- chance of profit/risk of loss;
- remuneration of staff;
- who has the power to discipline, dismiss, and hire,
- the parties perception of their relationship;
- the intention of the parties; and
- degree of integration.

I have considered the above and I find myself in full agreement with the delegate of the Director: Seres worked as an employee as that term is defined by the *Act*. It is conceivable that a person might operate a separate business within the Lassthetic salon but that is not what Seres did. It is plainly clear to me that Seres was at all times an employee.

At no time did Seres have full control over her hours and days of work. That was set through agreement as it is in an employment relationship.

Seres' earnings were the result of commissions and she was paid by Lassthetic, not her customers. There was no chance of profit or loss.

Many of the tools used by Seres in her work were provided by the salon.

Castenmiller hired Seres as one hires an employee. She terminated Seres as one would terminate an employee. Indeed she refers to Seres last day of work as a last day of employment.

As matters are presented to me it is clear that Seres learned of the work at Lassthetic through an advertisement which presented that work as one presents a plain, ordinary job. There is no evidence which shows that Seres was told, on being hired, that it was something other than a job for which she had applied. Seres clearly perceived herself as an employee prior to stating that she was self-employed. But even after that she clearly acted as an employee, through her agreement not start a business and not take clients away with her. I find that entirely inconsistent with the idea that she was actually operating her own electrolysis business, the latter because the clients are a vital part of what would be the business.

There was a clear intention to avoid Revenue Canada deductions at source but I am satisfied that it was always Castenmiller's intention to manage Seres as is set out in the commission agreement. The provision of electrolysis services was an important, integrated part of the business that was Lassthetic in the relevant period. Neither Seres, nor Castenmiller intended that Seres would operate a separate business with the salon. Seres' clients were the salon's clients, not her own. As Castenmiller presents matters to me, an independent contractor is nothing more than an employee who pays his or her own taxes.

I am in agreement with the delegate. Seres worked as an employee and as such she is entitled to vacation pay and statutory holiday pay under the *Act*.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated January 19, 1998 be confirmed in the amount of \$710.79 together with whatever further interest has accrued pursuant to Section 88 of the *Act*, since its date of issuance.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal