

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-

Dynasty Kitchen Cabinets Ltd.  
(the “Appellant”)

-of a Determination issued by-

The Director of Employment Standards  
(the “Director”)

**ADJUDICATOR:** E. Casey McCabe

**FILE No.:** 98/825

**DATE OF DECISION:** April 19, 1999

## DECISION

### APPEARANCES

Joe Ayache	for the employer
Douglas MacKay	for himself
Judy Reekie	for the Director of Employment Standards

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by the employer, Dynasty Kitchen Cabinets Ltd., of a Determination dated December 3, 1998 which required the employer to pay the sum of \$4,359.88 plus interest of \$268.52 to the complainant for outstanding vacation pay. The Director’s Delegate determined that the appellant had contravened Sections 58(1)(a) and 58(3) of the *Act*.

### ISSUES TO BE DECIDED

1. Is the complainant an employee under the *Act*?
2. If the answer to the first questions is positive, is he owed annual vacation pay?

### FACTS

In his initial complaint the complainant alleged that he was owed monies for unpaid annual vacation and compensation for length of service in lieu of notice. The Determination dated December 3, 1998 found that the complainant was owed an amount of \$4,359.88 on account of annual vacation pay plus interest of \$268.52 to December 3, 1998. The Director's Delegate determined that the complainant was not owed compensation for length of service. The complainant did not appeal that finding; however, the employer appealed the finding that the complainant was an employee and that it was liable for its failure to pay adequate annual vacation pay.

The employer, Dynasty Kitchen Cabinets Ltd. (“Dynasty”) operates a kitchen cabinet factory and showrooms at two locations. The factory and one showroom are located in Surrey, B.C. with the other showroom located in Burnaby, B.C.

The complainant was employed by Dynasty for the period of January 2, 1994 through December 18, 1997. He held the position and title of Sales Manager. His remuneration was set at \$3,600.00 per month plus car expenses. He received draws of \$1,800.00 on the 15th and 30th of each month. Statutory deductions were not taken from these pay cheques. The complainant was required to sign a letter which had the characteristics of an invoice stating that he had supplied training and advisory on kitchen cabinets in Surrey from “blank” period to “blank” period at a cost of “blank”. It appears that this blank form letter had been used consistently throughout the complainant’s period of employment.

## ANALYSIS

The crucial question in this case is whether the complainant is an employee or an independent contractor. Section 1 of the *Act* defines “employee” as:

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 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;

In the Determination dated December 3, 1998 the Director’s Delegate applied a 5 fold test in her analysis. The Director’s Delegate examined the control and direction exerted by the employer on the complainant’s employment; whether the complainant was required to provide tools; whether the complainant enjoyed a chance to profit in his employment; whether the complainant ran a risk of loss; and, the form of payment and length of service of the complainant.

With respect to the control test the Director’s Delegate referred to the employer’s submission of January 29, 1998. That submission provided a copy of the job description for the Sales Manager dated November 28, 1994. Under the heading entitled “Basic Function” the document states:

“A Sales Manager reports directly to the Chief Executive Officer. The primary purpose of this position is to develop a highly effective sales team, producing profitable sales for both the Company and each team member.”

The letter goes on to list Principal(sic) Accountabilities

1. Setting monthly sales targets by sales representative.
2. Setting weekly sales plans and activities levels.
3. Setting an account base for each sales representative.

4. Development of a dealer network.
5. Training program for all new sales staff.
6. Development of ongoing sales training programs.
7. Setting up an incentive program for all sales representatives.”

The job description shows that the Sales Manager reports directly to the Chief Executive Officer of Dynasty. The other evidence available in these submissions indicates that the complainant worked on site from approximately 8:00 a.m. to 5:00 p.m. daily. During the course of the day he would do field calls but that does not detract from the requirement and regularity of his on site attendance. The complainant was required to track his time on daily reports. It is apparent from reading the “Basic Function” and “Principal(sic) Accountabilities” entries on the job description that the Sales Manager is under the direction and control of the employer with an enumeration of specific duties to be performed in a specific manner. I agree with the Director’s Delegate that the employer exercised a sufficient degree of control over the complainant to satisfy the criteria of the control test. Furthermore, it is clear from reading the material that the duties of the complainant were an integral aspect of and were fully integrated into the employer’s operation.

The file material indicates that any supplies and equipment the complainant required to perform his duties and the work locations at which the duties were performed were provided by the employer.

The complainant was paid a flat rate of \$3,600.00 per month based on two payments respectively of \$1,800.00 on the 15th and 30th of each month. His income was fixed rather than being the difference between his costs of providing his services and the \$3,600.00/month revenue. Therefore, there was little chance for the complainant to increase his profitability. Conversely, the complainant had little risk of loss as his remuneration remained constant even if the jobs that he sold were unprofitable. He bore no risk of loss.

The manner in which the complainant was paid remained consistent for the term of his employment. He received those payments regardless of customer satisfaction or bad accounts. This is a strong indication of an employment rather than a contractual or “for profit” relationship between the complainant and Dynasty.

In its submission of January 4, 1999 the employer argues that the complainant wished to be considered self-employed for personal reasons to his own benefit. The employer felt that the complainant wanted to be considered self-employed for the sake of their business relationship. The employer states that the complainant may have sought certain tax write-offs which are inconsistent with the claim for holiday pay. In answer to the employer’s argument I refer to section 4 of the *Act*. That section specifically states that the requirements of the *Act* cannot be waived and that the requirements of the *Act* or the regulation are minimum requirements and any agreement to waive those requirements is of no effect subject to sections 43, 49, 61 and 69 which are not applicable here.

In its submission of January 29, 1998 the employer raises further arguments with respect to other business activities of the complainant. In effect those facts were considered by the Director's Delegate in her initial determination that compensation for length of service was not payable. The employer seeks to transfer the argument that because the complainant was selling products from other suppliers to customers while he was in the employ of Dynasty to a basis for concluding that the complainant was an independent contractor rather than an employee. I am not prepared to accept that rational. Rather, on the balance of probabilities I find for the reasons stated above that the complainant was an employee of Dynasty. A breach of his employment relationship with Dynasty does not relieve the employer of its obligation to pay annual vacation pay notwithstanding that the same facts were a consideration in relieving the employer of its obligation to pay compensation for length of service in lieu of notice.

**ORDER**

I confirm the Determination dated December 3, 1998 and order interest to be paid from that date to the present.

**E. Casey McCabe**  
**Adjudicator**  
**Employment Standards Tribunal**