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-

Just Pia Productions Inc.

(the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	98/809
DATE OF HEARING:	April 6th, 1999
DATE OF DECISION:	April 27, 1999

DECISION

APPEARANCES

Pia Shandel, President & Director	Just Pia Productions Inc.
Jan Phillipson	on her own behalf (by teleconference)

OVERVIEW

This is an appeal brought by Pia Shandel on behalf of Just Pia Productions Inc. (the "employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on November 30th, 1998 under file number 83174 (the "Determination").

The Director's delegate determined that the employer owed its former employee, Jan Phillipson ("Phillipson"), the sum of $2,421.80 on account of one week's wages as compensation for length of service (section 63), statutory holiday pay (section 46), recovery of business costs paid by Phillipson [section 21(2)], concomitant vacation pay (section 58) and interest (section 88).

The employer's appeal was heard at the Tribunal's offices in Vancouver on April 6th, 1999 at which time I heard evidence and submissions from Pia Shandel, the sole officer, director and shareholder of the employer and from Ms. Phillipson. Neither party called any other witnesses and the Director did not appear at the hearing.

ISSUE TO BE DECIDED

Although the employer originally appealed the delegate's finding that Phillipson was an "employee" as defined in section 1 of the *Act*, the employer withdrew this aspect of its appeal at the appeal hearing. Accordingly, the only issue that is now before me concerns the recovery of "business costs". The delegate awarded Phillipson $108 on account of a fax machine rental, $181.57 as reimbursement for telephone charges incurred by Phillipson on the employer's behalf and $678.92 representing one-half of the wages paid by Phillipson to one Wendy Fister ("Fister"); only this latter disbursement is now in dispute.

FACTS AND ANALYSIS

The employer is the corporate vehicle utilized by Ms. Shandel for the production of a daily "entertainment and public affairs" program that is broadcasted on a local radio station. Ms. Shandel is

the host of that program and Phillipson, during the times material to the Determination, was the show's producer which is a job that involves both on-air and off-air duties. The delegate found that Phillipson engaged Fister, with Shandel's prior express or implied authorization, to serve as a research assistant for the program. Shandel vigorously denies that she ever authorized Phillipson to hire Fister to work for the employer as a research assistant. I note that I have not had the benefit of the evidence--either by way of a written statement or via *viva voce* testimony--of the critical witness in this particular dispute, namely, Fister herself.

The delegate held, at page 6 of the Determination:

> "Phillipson billed [the radio station] for the cost of Ms. Fister and her bills show Ms. Fister also researched for the John Hadley show. Ms. Phillipson could not give me a breakdown of what proportion of Wendy Fister's work went to each show. Ms. Phillipson said that John Hadley was filling in for Pia Shandel but [the radio station] maintains that they were separate shows and John Hadley was not simply filling in...
>
> Ms. Shandel says when she asked Ms. Phillipson about Ms. Fister, Ms. Phillipson replied that [the radio station] would pay for Ms. Fister. Ms. Phillipson did bill [the radio station] for Ms. Fister but [the radio station] refused to pay.
>
> Wendy Fister confirmed Jan Phillipson paid her and her recollection is consistent with having done research for both shows. Without records to determine how Ms. Fister's work was split between the two shows, it is appropriate to apportion her work equally...this amount is a business cost owed to Ms. Phillipson regardless of which version of this situation (Ms. Shandel's or Ms. Phillipson's) is accurate."

In my view, the delegate has misstated the proper question to be addressed in this situation. Section 21(2) of the *Act* concerns an employer's business costs that the employer *requires* an employee to pay personally, such as the fax and telephone charges that were properly ordered to be recovered in this case. However, there is absolutely no evidence before me that the employer ever *required*--either directly or indirectly--Phillipson to retain and pay, from her own personal funds, Fister to act as a research assistant for Ms. Shandel's radio show. Indeed, Phillipson's own evidence is that she felt a personal obligation to pay her friend, Ms. Fister, and was never directed by the employer to pay Ms. Fister out of her own pocket.

Phillipson "voluntarily"--in her words--paid Fister with the expectation that she would be able to recover the expenditure from the employer ("I paid her when Pia Shandel didn't; I felt an obligation to a 20 year old student and that I would be able to recoup the funds"). It seems to me that the entire essence of this case has been misconceived; if Fister was an employee of Just Pia Productions Inc. then Phillipson ought to have advised her friend to advance a claim against that party. Phillipson's action of taking personal responsibility for the payment of Fister's wages strikes me as being entirely consistent with the employer's assertion that Fister was, in fact, employed by Phillipson.

The uncontroverted evidence is that Fister--who was a friend of Phillipson--was engaged by Phillipson to provide research assistance to Phillipson. The key question that must be addressed is whether Fister was retained by Phillipson, acting as agent for the employer or, rather, by Phillipson in her own right. Of course, the employer takes the latter position, Phillipson the former.

In my view, the delegate erred when she concluded that, in effect, any person hired by an employer's employee who, in turn, provides services to the employer, is by reason of that fact alone, an employee of the employer. I completely reject such an approach. Using this analytical framework, for example, if I in my capacity as a university professor hired an individual to assist me with my grading duties that assistant would, by reason of my unilateral action, become a university employee. In my view, the question of the third person's status must, in all cases, be determined by examining the relevant the facts of the situation and then applying the well-known governing legal principles to those facts. In such a fashion it can then be determined whether or not an employment relationship has been established between the third person and the original employer.

What are the relevant facts here? Fister was engaged by Phillipson; Fister was paid by Phillipson; Fister was solely directed and controlled by Phillipson; Phillipson originally submitted her claim for reimbursement not to the employer, but rather to the radio station; some of Fister's duties were of absolutely no benefit to the employer, namely, the work undertaken for the John Hadley show, but nonetheless this work benefited Phillipson in the latter's capacity as producer of the Hadley program.

Why would Phillipson have engaged Fister in the first place? The weight of the evidence is more consistent with the position espoused by the employer. Phillipson was hired to produce Ms. Shandel's program--a full-time job--however, sometime later Phillipson was offered the opportunity to also produce another program and thus she hired Ms. Fister so as to ensure that she (Phillipson) satisfied all of her obligations to both programs. Ms. Shandel, on behalf of the employer, did not object to Phillipson hiring an assistant but such consent to this arrangement did not thereby make Fister an employee of Ms. Shandel's firm. The fact that the employer may have benefited in some way from Fister's services does not, of itself, create an employment relationship between Fister and the employer. The provision of services that benefit a party is a factor to be considered in determining whether or not there is an employment relationship but the mere provision of beneficial services is not determinative, otherwise all true independent contractors would have to be characterized as employees of their various customers.

In my view, the evidence shows that Fister was employed by Phillipson but not by Just Pia Productions Inc. In coming to this conclusion, I might add that I have drawn an inference adverse to Phillipson from the latter's failure to produce any corroborating evidence from Fister.

Finally, even if I had held that Fister was an employee of Just Pia Productions Inc., I do not see how Phillipson would be able to claim reimbursement for wages voluntarily paid by her to Fister in the absence of any evidence that such payment was required--either directly or indirectly--by Just Pia Productions Inc. If Fister *was* employed by the employer, Fister ought to have been paid by the employer; Phillipson's gratuitous payment (and note that I have held that it was *not* a gratutitous

payment since Phillipson was the employer) to Fister would have to be recovered by way of an ordinary civil action brought against Fister rather than Just Pia Productions Inc.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied by deleting the award of $678.92 representing reimbursement of wages paid by Phillipson to Fister. In all other respects the Determination is confirmed. Accordingly, after making the appropriate adjustment on account of vacation pay, Phillipson is awarded **$1,465.95** together with interest to be calculated pursuant to section 88 of the *Act*.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal