

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Premier Cutlery Company Limited
("Premier")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/009

DATE OF HEARING: April 18, 1997

DATE OF DECISION: April 25, 1997

DECISION

APPEARANCES

Richard H. Clark	on behalf of Premier Cutlery Company Limited
B. Jody Lotzkar	on behalf of Henry Krepp
Henry Krepp	for himself

OVERVIEW

This is an appeal by Premier Cutlery Company Limited (“Premier”), under Section 112 of the *Employment Standards Act* (“the Act”), against a Determination which was issued by a delegate of the Director of Employment Standards on December 12, 1996. The Determination requires Premier to pay vacation pay, statutory holiday and one month’s wages to Henry Krepp (“Krepp”) in the amount of \$13,267.43 (including interest).

Premier gave several reasons for its appeal, of which the key points were that Krepp was not an employee as defined by the *Act*, vacation pay was included in commissions paid to Krepp and the Director’s delegate did not conduct a thorough investigation or was unduly biased in favour of Krepp.

A hearing was held on April 18, 1997 at the Tribunal’s offices by way of a telephone conference call, in which Richard H. Clark (“Clark”), the President of Premier, represented Premier. The primary purpose of the hearing was to clarify certain points in the extensive written submissions.

ISSUES TO BE DECIDED

Was Krepp an employee of Premier?

If so, is he entitled to the wages, vacation pay and statutory holiday pay as set out in the Determination?

FACTS

The starting point of this appeal is the Determination in which the Director's delegate made various findings, following her investigation of Krepp's complaint. The following findings by the Director's delegate are of particular relevance to this appeal:

- Krepp was employed by Premier from July 4, 1962 to October, 1996, as a sales person.
- Initially, Krepp was paid a salary and a commission. As of January 1, 1972 Krepp and Premier entered into a written agreement whereby Krepp would receive a 15% commission only. The commission was to cover salary and all expenses. The agreement makes no mention of Vacation Pay and establishes Krepp's sales territory and a minimum volume of expected sales.
- Krepp was provided with business cards which describe him as: "Vancouver District Manager, Premier Cutlery Co. Ltd."
- Premier does not monitor daily activities of sales persons however they are required to submit daily sales reports.
- Vacation periods for salespersons were established by Premier.
- Premier deducted statutory withholdings from Krepp's commission payments and issued a T-4 statement for income tax purposes. After Premier was notified of Krepp's Employment Standards complaint, it stopped taking the statutory deductions.
- Premier made yearly contributions on behalf of Krepp, to a profit sharing plan which it established for employees.
- When Premier carried group life insurance, Krepp was covered under the plan. This plan was discontinued some years ago.
- Approximately ten years ago Krepp began to import and sell products to Premier customers. He sold his product line under the name Krepp Holdings.
- Premier did not prohibit Krepp from selling other products and took no steps to change the relationship between Krepp and the company.
- Krepp filed separate income tax returns, one as an employee of Premier and another as Krepp Holdings.

- Premier's records indicate that Krepp generally worked less than 15 days a month. Krepp could not show evidence to prove that he worked more than 15 days a month prior to November 1, 1995.
- Premier notified Krepp by way of a memo dated August 30, 1996 of its intention to sever their relationship in 2 months.
- In a memo from Richard H. Clark (dated October 28, 1996), Premier advised Krepp of its decision to terminate his services "for just cause" effective October 30, 1996.

My review of the documents submitted to the Tribunal reveals that the agreement between Premier and Krepp, which was committed to writing in a letter dated 14 December 1971, was effective January 1, 1972 and altered the agreement which had been in effect previously.

Paragraph No. 3 of the letter sets out the following terms:

The Company will pay no car allowance, mileage rate, hotel, meals or other expenses in the operation of the territory and in place of salary, commission and bonus as in the past, your total remuneration (including your expenses which you will pay yourself) will be:

- (a) 15% of all net credited shipments of goods into your section of territory; and
- (b) 2% of all credited shipments into the mainland territory being turned over on January 1st to Mr. K. Nixon, for your services in supervising and assisting (wherever necessary and thought to be of benefit) in the operation of the territory by Mr. Nixon. That section of territory will be known as "Vancouver 2". Payment will be made to you by the 15th of each following month.

The opening sentence of the letter notes that the changes which became effective January 1, 1972 were made "...to conform to your (Krepp's) wishes in reducing and changing the territory you (Krepp) have been operating."

The profit-sharing plan document states in Article 1.1:

- 1.1 "Plan" means this Profit-Sharing Plan for employees of Premier Cutlery Company Limited and as the same may be amended from time to time.

"Eligible employees" are defined in the document at Article 1.4.

In a letter dated September 5, 1996 (from R. H. Clark to the Director's delegate), the number of days which Premier records as work days for Krepp each year is shown as:

1991 - 79 days
1992 - 81 days
1993 - 89 days
1994 - 76 days
1995 - 65 days

These data are drawn from "Daily Sales Reports" which Krepp submitted to Premier.

The memo dated August 30, 1996 from Richard Clark to Henry Krepp states, in the second paragraph:

Please consider this memo your official notice that we are discontinuing your services as our representative in the Victoria\Vancouver area, effective 2 months from the date (August 30, 1996).

The memo dated October 28, 1996 from Richard H. Clark to Henry Krepp states:

Please be advised we have decided to terminate your services with Premier Cutlery for just cause, the reasons for which will be outlined below.

This termination notice will be effective simultaneously with the termination notice sent to you on August 30th, 1996.

The second page of the same memo begins as follows:

Please make no mistake. You are not being terminated for making a complaint to the Ministry of Labour. You are being terminated for deliberately misleading the Ministry of Labour and fabricating evidence which is not true.

Your repeated refusal to respond (to a memo dated July 24th) is insubordinate and this is also justifiable grounds for termination.

Premier gives several reasons for its appeal of the Determination. First, it says that Krepp was not an employee as defined by the *Act* because it did not have control or direction over Krepp. Second, Premier relies on the terms of its 1972 agreement with Krepp that vacation pay was included in the commissions paid to him. That is, Premier and Krepp had agreed that commissions paid to him would present his total remuneration.

Third, Premier submits that it did not control on which days Krepp worked or when he took vacation. Fourth, Premier relies on the terms of its agreement with Krepp which requires him to pay his own expenses. Finally, Premier states in its appeal:

We believe the Determination should be reduced to Mr. Krepp's last month's commission (\$4,400.00 less \$441.14 in collect phone calls, less \$29.85 in collect UPS charges, less any other legitimate deductions).

Premier's submission to the Tribunal (dated February 25, 1997) sets out, at length, its position with respect to various issues such as: the number of days worked by Krepp; the quality and scope of the investigation conducted by the Director's delegate; the sales activities carried on by Krepp and Krepp Holdings; and, the relationship between Krepp and Nixon Agencies. The submission concludes:

Finally, in conclusion, it is our belief we owe Henry Krepp no vacation pay for the following 3 reasons:

- (1) there is no Master-Servant relationship as defined by the *Act*.
- (2) Mr. Krepp's vacation pay was already included in his monthly cheque, as evidenced by the phrases:
"to conform to your wishes"
"Your total remuneration"
- (3) Mr. Krepp received commissions for orders which accrued while he was on vacation that amounted to more than the necessary amount under the *Act*.

ANALYSIS

The calculation schedule attached to the Determination sets out the following explanation of the total amount found to be payable by Premier:

Wages - October, 1996	\$ 4,400.00
Statutory Holiday Pay	\$ 1,041.54
Vacation Pay	\$ 7,470.00
Interest	<u>\$ 355.53</u>
TOTAL	\$13,267.43

I note that the individual amounts above total \$13,267.07 revealing an error in addition of \$0.36.

Premier's appeal acknowledges that Krepp's commissions for the month of October, 1996 has not been paid. I note that the appeal does not challenge the amount of statutory holiday

pay which the Determination shows as payable. Premier challenges the Determination on the ground that Krepp was not an employee and, furthermore, that vacation pay was included in commissions paid to him.

Was Krepp an employee?

Section 1 of the *Act* contains the following definitions of employee and employer:

“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;*

“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;*

In *Fenton v. Forensic Psychiatric Services Commission* [(1991) 56 B.C.L.R. (2d) 170], the B.C. Court of Appeal noted, at p.185, that the definitions of “employer” and “employee” should be given a liberal interpretation:

First it should be noted that 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 (1988) Ltd.* [(1991) 58 B.C.C.R. (2d) 341], the B.C. Supreme Court noted, at page 344, that “...the proper characterization of a labour-based relationship is often not a straightforward exercise”. The Court also noted, at p.345, that:

The issue of whether a relationship is one of a contract of service (i.e., employment) or a contract for services (i.e., independent contractor) has traditionally turned on the degree of control that the party for whom the work is being done has over the activities of the party conducting the actual work. The courts have weighed four factors in assessing the nature and degree of control inherent in the relationship: the master’s power of selection of the servant, the payment of wages, control over the method of work, and the master’s right of suspension or dismissal.

When I review all of the facts and submissions, I am forced to the conclusion that Krepp was an employee of Premier. I come to this conclusion regardless of which legal test I apply. Both the “four-factor test” [*Walden v. Danger Bay Productions Ltd.* (1994) 90 B.C.L.R. (2d) 180] and the more recent “integration test” (also known as the “organization test” or the “economic dependency test”) lead me to conclude that Krepp was an employee. Krepp was employed as a salesperson to provide service to existing customers and to seek out new customers. He was paid a commission and thus received “wages” as defined in the *Act*. The services he performed were for the ultimate benefit of Premier Cutlery Company Ltd. The duties performed by Krepp were the sort of duties routinely performed by salespersons employed within Premier and in many other organizations.

Krepp participated for many years in the profit-sharing plan which Premier made available for its employees. Finally, the references to “insubordination” and “just cause” in Richard Clark’s memoranda (dated August 30, 1996 and October 28, 1996) suggest that in Clark’s mind there was an employment relationship between Krepp and Premier.

Is Krepp entitled to vacation pay?

Premier relies on the agreement which became effective on January 1, 1972 to argue that Krepp is not entitled to vacation pay.

Section 4 of the *Act* states:

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.*

Premier’s argument is essentially the same as that adapted by the employer in *Atlas Travel Services Ltd.*, a B.C. Supreme Court case reported at (1994) 99 B.C.L.R. (2d) 37.

In *Atlas Travel*, the basic argument was that the commission which the employees received (based on a written agreement between Atlas and its employees) included both annual vacation pay and general holiday pay. The Court concluded, at p.41, that the employer’s

attempt to include employees' vacation pay and statutory holiday pay in the commissions it paid to them did not comply with the minimum requirements of the *Act*.

Section 58(1)(b) of the *Act* requires an employer to pay, after 5 consecutive years of employment, "...at least 6% of the employee's total wages during the year of employment entitling the employee to the vacation pay."

I accept Premier's submissions that Krepp did not work on a full-time basis. However, that does not deprive him of his entitlement to vacation pay. Vacation pay is calculated as a percentage of total wages earned and must be paid to full-time and part-time employees. I find that the Director's delegate adopted the correct method of calculating Krepp's entitlement to vacation pay under Section 58 of the *Act*.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed in the following amounts:

Wages (commissions):	\$ 4,400.00
Statutory Holiday Pay	\$ 1,041.54
Vacation Pay	<u>\$ 7,470.00</u>
	\$ 12,911.54

Interest is payable on these amounts as required by Section 88 of the *Act*.

Geoffrey Crampton
Chair
Employment Standards Tribunal