

**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 -

Wendy Benoit  
operating as “Academy of Learning”  
 (“ Benoit ” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2000/245

**DATE OF DECISION:** June 14, 2000

## DECISION

### OVERVIEW

This is an appeal brought by Wendy Benoit (“Benoit” or 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 March 7th, 2000 under file number ER 76684 (the “Determination”).

It should be noted that the Determination was issued against both Wendy Benoit and Edward Benoit who, I gather, jointly operated an enterprise under the firm name “Academy of Learning Computer & Business Career College”. The appeal before me was filed by Wendy Benoit who does not, in any fashion, purport to appeal the Determination on Edward Benoit’s behalf. I do not know if Edward Benoit has filed a separate appeal of the Determination.

### THE DETERMINATION

The Determination is a lengthy document running some 19 pages plus voluminous attachments. By way of the Determination, the delegate ordered Ms. Benoit and Edward Benoit to pay their former employee, Linda Jaine (“Jaine”), the sum of \$4,259.18 on account of unpaid wages (including 1 week’s wages as compensation for length of service) and interest. The delegate concluded, *inter alia*, that Ms. Jaine was an employee, that she had a valid unpaid wage claim and that she was terminated without cause and thus entitled to 1 week’s wages as compensation for length of service.

### THE APPEAL

Ms. Benoit’s submissions to the Tribunal are, at best, rather scanty. Appended to the Tribunal’s form of notice of appeal are two letters, both dated April 3rd, 2000. The first 1-page letter simply confirms that an appeal of the Determination is being filed. The second letter, 1¼ pages in length, sets out the reasons for appeal which, so far as I can gather, are as follows:

- The delegate erred in finding that Ms. Jaine was an employee rather than an independent contractor;
- The delegate erred in calculating Ms. Jaine’s unpaid wage entitlement; and
- Ms. Jaine was not entitled to any compensation for length of service because she quit.

The only other submission from the appellant is a letter dated May 18th, 2000 signed by Karl Koslowsky—this 2-page letter is on “Academy of Learning Computer & Business Career College” letterhead but Mr. Koslowsky’s position is not identified. I presume Mr. Koslowsky had Ms. Benoit’s authority to file this submission on her behalf although his authority to act is not specifically set out in the letter. This latter submission addresses only Ms. Jaine’s time records for three particular days and alleged anomalies therein.

I shall deal with each of the above-noted grounds of appeal in turn.

## ANALYSIS

At the outset I should observe that in appeal proceedings before the Tribunal, it is the appellant who bears the burden of proving that the determination is incorrect. A determination may be incorrect with respect to findings of fact or as to conclusions of law or the application of relevant legal principles.

The sketchy appeal documents before me contain mere allegations or assertions and not much more. Certainly, for the most part, Ms. Benoit has not provided the Tribunal—although specifically requested to do so—with “all records and documents” that would show that the Determination is incorrect. I am not satisfied that this appeal is even properly before the Tribunal—see *Bob Graham Ltd.*, BC EST #D173/00 (Reconsideration of D096/00). Notwithstanding my reservations as to the sufficiency of this appeal, I will nonetheless address the three principal issues raised.

### *Jaine’s Status*

The suggestion that Ms. Jaine was not an “employee” as defined in section 1 of the *Act* is, to be blunt, fanciful.

In each of the two documents setting out the terms of Ms. Jaine’s engagement Jaine is described as an “employee”; her compensation is described as a “salary” and the second agreement contains references to vacation time, sick leave and statutory holidays—references that would have been wholly unnecessary if Jaine was truly an independent contractor. Ms. Jaine completed a form—presented to her by the employer—entitled “Employment Application”. Ms. Jaine also signed forms acknowledging the employer’s “Student Record Confidentiality Policy” and “Policy on Honesty” both of which referred to her “employment”. Ms. Jaine signed a “Permission Statement” which referred to her possible “employment” by the Academy of Learning. The Academy of Learning applied for a “targeted wage subsidy” relating to Ms. Jaine—in that application she was referred to as an “employee”. At the outset of her engagement, the employer had Jaine complete a Revenue Canada TD1 form—a form that an independent contractor would not have completed.

In a letter dated July 8th, 1998 addressed to Ms. Jaine, Mr. Benoit wrote, in part, “It is with regret that I have no option but to *terminate your employment* with the Academy of Learning effective immediately.” (my italics) In a letter dated July 30th, 1998 from the employer to the Canada Employment Centre, Ed Benoit referred to his having “hired” and having “employed” Ms. Jaine. Ed Benoit signed a “Record of Employment” that was issued to Ms. Jaine on July 16th, 1998.

Certainly, the evidence is overwhelming that during (and even after) her tenure with the Academy of Learning, Ms. Jaine was considered by the Academy to be an “employee” of the Academy.

In the Determination, the delegate canvassed—at some length—the legal principles relating to the question of whether one is an employee or a contractor and applied those principles to the facts at hand. I entirely agree with the delegate’s conclusion that Ms. Jaine was an “employee” as

defined in section 1 of the *Act*—any contrary conclusion would have been, in my view, patently unreasonable.

*Jaine's Unpaid Wage Entitlement*

Ms. Benoit asserts that the delegate incorrectly calculated Ms. Jaine's unpaid wage entitlement, however, the only substantive point raised with respect to her wage claim is contained in Mr. Koslowsky's May 18th, 2000 submission in which he claims that Jaine's time sheets are inconsistent with her claimed working hours. Two points are to be noted. First, Jaine, by contract, was paid a *monthly salary* not an hourly rate; the delegate awarded Jaine compensation based on her monthly salary as set out in her two employment contracts. Second, the employment contract that governed after April 27th, 1998 specifically provided for the employer's right to refuse to pay for days not worked due to illness or other unexcused absence. One has to wonder—as did the delegate (see Determination, p. 9)—why the employer did not raise this issue until after Jaine's employment ended.

*Compensation for length of service*

On July 7th, 1998, Jaine submitted a letter of resignation; she gave her employer 1 week's notice (and suggested she might be prepared to give more notice) and proposed that her last working day would be July 13th. The employer was, of course, free to accept her resignation in which case no compensation for length of service would have been payable provided the employer allowed Ms. Jaine to work through her notice period [see section 63(3)(c) of the *Act*].

However, the employer refused to accept Ms. Jaine's offer of working notice and proceeded to summarily terminate her (effective July 8th, 1998). There is nothing before me to suggest that the employer had just cause for termination. The employer did not pay Jaine 1 week's wages upon termination nor did the employer give Jaine 1 week's written notice of termination in lieu of paying compensation for length of service. Inasmuch as Jaine's tenure exceeded the 3-month threshold set out in section 63(1) of the *Act*, the delegate quite properly awarded 1 week's wages as compensation for length of service.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as against Wendy Benoit in the amount of **\$4,259.18** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**