

**BC EST # D250/96**

**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 -

Jody Fireman and Jeanette Fireman Operating  
the Hockey Gazette  
("Mr. and Mrs. Fireman")

- of a Determination issued by -

The Director Of Employment Standards

**ADJUDICATOR:** David Stevenson

**FILE NO.:** 96/342

**DATE OF HEARING:** August 27, 1996

**DATE OF DECISION:** September 10, 1996

**DECISION**

**Appearances**

for the Appellant:	Jody Fireman Jeanette Fireman
for the Complainant/Respondent:	no one appearing
for the Director:	Sharon A. Charboneau

**OVERVIEW**

This appeal is brought by Jody and Jeanette Fireman (“Mr. and Mrs. Fireman”) pursuant to Section 112 of the *Employment Standards Act* ( the “Act”) from a Determination, No. CDET 002256, dated May 13, 1996, of a delegate of the Director of the Employment Standards Branch (the “Director”). The Determination found Mr. and Mrs. Fireman, operating the Hockey Gazette, to have contravened Section 17(1), Section 18(1), Section 8 and a requirement of Section 8 or Part 6 of the *Act*. The appellants say the determination is wrong because the complainant, Janet Dee, was not an employee, or if she was an employee she started her employment September 26, 1996, not September 12 as determined by the delegate of the director, she was not owed any money, as the “arrangement” between the complainant and Mr. Fireman was for commission on sales, Mrs Fireman should not have been named in the Determination and they were not given fair opportunity to respond to the allegations made by the complainant. The complainant did not appear. The Tribunal was notified late afternoon the day prior to the hearing by the complainant that she was not able to attend. She was notified at that time the hearing would proceed in her absence.

**ISSUES TO BE DECIDED**

Mr. Fireman has stated one of the issues as being whether Janet Dee was an employee of the Hockey Gazette. If she was not, that is an end of the matter. If she was, there are issues of when she commenced her employment with the Hockey Gazette and what she was to be paid. There is also the issue of whether she was induced, influenced or persuaded to become an employee of the Hockey Gazette by a misrepresentation of the type prohibited by Section 8 of the *Act*.

In response to the concern of Mr. Fireman about whether he had an opportunity to be heard in reply to the complaint, it is not necessary to comment on whether the function of a delegate of the director is a sufficiently “judicial” action to require application of the principles of natural justice, because any concern about an absence of fair hearing has been cured by this process. At the end of the day Mr. Fireman was satisfied he had adequate opportunity to respond to the complaint.

## **FACTS**

After a full review of the evidence, I have reached the following conclusions of fact concerning the events which are relevant to the issues I have to decide:

1. The Hockey Gazette was a renaming of a sole proprietorship operated by Mr. Fireman and registered with the Registrar of Companies as, Jody Fil Fireman operating as MVP Sports Gazette. Mrs. Fireman is not shown as having any interest in the proprietorship.
2. The Hockey Gazette, which is currently in a publication “hiatus”, was a newspaper designed to cater to the interests of the amateur hockey community, including minor hockey, junior hockey, adult recreational hockey, female hockey and ringette. Mr. Fireman, with some assistance from Mrs. Fireman, raised funds and interest for the publication, contributed to its content, printed and distributed the publication. It was distributed free to many hockey arenas in the lower mainland and the east and west Kootenays. It relied exclusively on advertising to fund its preparation, printing and distribution.
3. In March of 1994 Mr. Fireman met Janet Dee and featured her in one of the issues. Approximately one year later Mr. Fireman received a call from Janet Dee wishing to discuss advertising in the publication. He and Janet Dee met and the meeting turned into a more broad based discussion about Janet Dee getting involved with the paper and contributing in some way to it. Over the next four months there were more discussions between Mr. Fireman and Janet Dee. She expressed a desire to join the paper and Mr. Fireman expressed a desire to have her work for the paper.

4. By early September, it was apparent that Janet Dee would join the paper. On September 12, 1995, she contacted Mr. Fireman and told him she would like to do an interview of Larry Hayes, a local hockey personality. Mr. Fireman authorized her doing that.
5. On September 24, there was a meeting between Mr. Fireman and Janet Dee. Mrs. Fireman was also present. At the meeting terms of employment for Janet Dee were reviewed and discussed. On September 27, a letter of employment was given to Janet Dee.
6. On October 17, Janet Dee was terminated by Mr. Fireman.

## ANALYSIS

There is no doubt Janet Dee was an employee of the Hockey Gazette. There is also no doubt that her employment commenced September 12, 1996. It was on that date she was authorized and instructed to perform work for the Hockey Gazette. The *Act* defines “work”:

**“work”** means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.

On September 12, Janet Dee sought and received authorization to conduct an interview with Larry Hayes. She prepared an article based on the interview, which appeared in the September 15, 1995 issue of the Hockey Gazette. She was also developing a regular feature concept for the publication called “Hockey Moms”. This concept had been discussed with Mr. Fireman, who had approved the concept as a potential feature of the publication. There was, however, no discussion or agreement up to September 24, 1996 fixing her wages or setting out any other requirements of the job she would have with the publication.

On September 24, 1995, Janet Dee met with Mr. and Mrs. Fireman to discuss her terms of employment. On September 27, Mrs. Fireman prepared a letter confirming the elements of the discussion. The letter begins:

Welcome to The Hockey Gazette, the fastest growing newspaper in British Columbia. It’s [sic] great to have you aboard.

As per our agreement your start date was September 25, 1995.  
Your remuneration is as follows:

Selling advertising	\$1,000.00 per month
Writing	\$500.00 per month
Total	\$1,500.00 per month

Plus 10% of your gross sales every month. **Minimum** qualification per month  
\$4,000.00.

The agreement is inaccurate to the extent that the employer failed to recognise the existence of the employment relationship that was in place as of September 12, 1995, but it clearly identifies sales as a substantial component of the job. Janet Dee did not complain or indicate the letter did not accurately reflect the job she formally agreed to take on September 24, 1995. There is nothing in the evidence to suggest Janet Dee was misinformed or misled about the availability of the position, the type of work expected of her, the wages or the conditions of work. Until her termination on October 17, 1995, she performed the job as it was described in the confirmation letter of September 27. She compiled sponsor lists and made telephone contact with the list of potential sponsors provided by Mr. Fireman, met with potential sponsors, continued to develop her "Hockey Moms" feature and do other writing for the publication.

I accept Mr. Fireman's evidence that his interest in Janet Dee becoming involved with the publication was heavily influenced by his perception of her ability to "sell" advertising in the publication. His decision to terminate her was equally influenced by her failure to meet his expectations in the sales aspect of the job.

I find no support for the conclusion Section 8, or a requirement of Section 8 or Part 6, of the *Act* was been breached by Mr. or Mrs. Fireman in the hiring of Janet Dee. That aspect of the Determination is set aside.

Section 16 of the *Act* requires an employer to pay an employee at least the minimum wage for work performed by the employee. The *Act* also requires an employer to pay at least the minimum daily hours for which an employee is entitled to be paid under subsection 34(2) of the *Act*. In the absence of any evidence of an agreement on wages to be paid to Janet Dee from September 12, 1995 to September 25, 1995, I find she is entitled to receive minimum wage for four hours on each day which she started work between September 12 and September 25.

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On the evidence this encompasses September 12, 13, 18, 19, 20, 21 and 22. I would not allow any payment for Sunday, September 24, which Janet Dee claims she spent meeting with Mr. and Mrs. Fireman to discuss terms and conditions of employment at her home. There is no suggestion in the evidence she performed any work on that day.

The employer has breached Section 16 of the *Act* for the period September 12 to September 25, 1995. Janet Dee is entitled to receive the equivalent of 28 hours pay at minimum wage for the described period.

The employer has also breached section 16 of the *Act* in respect of the period September 25, 1995 to October 17, 1995. Mr. Fireman argues he should not have to pay Janet Dee any wages as she did not do the job she was expected to do.

That argument may be a satisfactory response to the question of why Janet Dee was let go during her probationary period. It does not represent a valid reason for failing or refusing to pay an employee for the time they were employed. The *Act* demands otherwise. Janet Dee worked for three weeks and one day. It was agreed she would be paid \$1500.00 per month plus 10% of sales over the minimum qualification. She earned no commission during her employment, but she is entitled to be paid the agreed upon rate of pay. Mrs. Charboneau, the delegate of the director, has calculated the regular wage of the employee to be \$8.65. There has been no dispute with that calculation. The only record of hours worked by Janet Dee were supplied by her. She worked on a total of seventeen days. With only a few exceptions, minimum daily hours provision would require the employer to have paid her the equivalent of four hours at her regular wage. Mr. Fireman made an argument about the amount of work being done by Janet Dee on the days for which a wage claim was filed. This argument, even if accepted, would not alter my conclusion about the wages payable to Janet Dee. Applying the minimum daily wage provisions to the days worked, she is entitled to receive the equivalent of sixty-eight and one-half hours wages at regular wage plus holiday pay for the period September 25, 1995 to October 17, 1995.

The Determination will be varied to the extent necessary to give effect to above conclusions.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination, No. CDET 002256, be varied as follows:

1. The name of Jeanette Fireman should be deleted from the Determination and the name of the employer be changed to read, “Jody Fil Fireman operating MVP Sports Gazette and the Hockey Gazette”;
2. The wage loss attributed to the finding of a breach of Section 8, a requirement of Section 8 or Part 6, of the *Act* be cancelled;
3. The wages payable to Janet Dee be varied to require payment of the equivalent of twenty-eight hours wages at minimum wage, and;
4. The payment of the equivalent of sixty-eight and one half hours wages at regular wage plus holiday pay on those amounts.

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**David Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**

DS:ds