

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 -

Diane Bilodeau operating as Dynamite Office Services
(the “ Appellant ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/104

DATE OF HEARING: May 8, 2000

DATE OF DECISION: July 5, 2000

DECISION

APPEARANCES:

Diane Bilodeau	for the appellant
Maureen Sunnus	for herself
No one	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”), by Diane Bilodeau operating as Dynamite Office Services (the “employer”) from a Determination dated February 17, 2000. That Determination found the employer liable in the amount of \$686.24 for overtime and vacation pay plus \$38.49 interest for a total amount of \$724.73.

ISSUE(S) TO BE DECIDED

1. Is the complainant an employee within the meaning of the *Act* and if so is she owed wages?

FACTS

The employer operates a bookkeeping and office service out of her home. The complainant worked as an office worker/bookkeeping assistant from February 24, 1999 to April 1, 1999. The complainant’s rate of pay was \$8.00 per hour.

It should be noted that the employer is a small business operation. At the time that the complainant was hired the employer required help due to the pressures of “Income Tax” season. It became apparent during the course of the hearing that the employer expected more from the complainant than the complainant’s work experience allowed her to produce. Furthermore, both the complainant and the employer agreed that her employment was temporary while the employer sought a more qualified assistant.

The evidence disclosed that the employer and the complainant were acquaintances. The evidence further disclosed that at the point of hire the complainant had asked for a \$10.00 per hour rate but the employer informed her that all she could afford was \$8.00 per hour. The rate of \$8.00 per hour became the complainant’s rate.

The complainant reported to the employer’s office. She worked a Monday to Friday rotation commencing at 8:30 to 9:00 a.m. and finishing between 4:30 and 5:00 p.m. The clients were clients of the employer and the work that the complainant performed were specific tasks assigned by the employer. The work was performed at the employer’s office. The only occasions that the complainant would leave the office would be to travel to a client’s premises to retrieve books or other information required to perform the tasks. The employer set the hours of work. The

employer supplied the computer and the programs that the complainant used to discharge her duties. The complainant held another part-time job working for a public opinion poll surveyor on certain evenings of the week.

I conclude that the complainant is an employee for the purposes of the *Act*. In arriving at this conclusion I have assessed the factors of control, the ownership of the tools, whether there is a chance of profit or risk of loss and whether the complainant is integrated into the employer's business. In reviewing the first factor of control I conclude that the employer controlled the days the complainant worked, the hours worked during those days and the nature of the work that was to be performed by the complainant. It is notable that the employer provided the clients and directed the complainant regarding which aspects of the bookkeeping that the complainant was to perform for each client. Furthermore, the complainant performed general office duties for the employer which could only be performed at the employer's place of business.

With respect to the ownership of the tools I note that the employer provided the computer and the programs for the complainant's use. That equipment was located at the employer's premises. The complainant was not expected to provide any tools to perform her duties.

In assessing a chance of profit or risk of loss I note that the complainant worked for a flat hourly rate of \$8.00 per hour and was subject to a schedule that was set by the employer. The complainant carried no overhead nor was there any chance to increase earnings other than by having additional hours assigned by the employer. I do not see where the complainant had assumed any risk of loss in the business sense nor could she have formed any expectation of profit except that which would arise from the hours assigned by the employer.

With respect to the integration test the question to be asked in applying that test is "whose business is it?" In this case I accept that the business was that of Diane Bilodeau operating as Dynamite Office Services. It was Bilodeau who provided the clients and who directed and controlled the work to be performed by the complainant. The complainant had no other bookkeeping clients of her own. Nor did she provide office services to other clients. As stated previously her only other source of income was a part time job with a public opinion surveyor where she would conduct the telephone surveys. Therefore I find that the complainant's employment was wholly integrated into Bilodeau's operation. Although the complainant would submit an invoice to Bilodeau for the hours worked each week it was Bilodeau who charged those hours out and who billed her clients for the work that had been performed by the complainant. For these reasons I find that the business was Bilodeau's and not the complainants.

The employer further argues that, should I find that the complainant is an employee, errors were made by the Director's Delegate in the Determination. Specifically the employer argues that the calculation of hours for February 24, March 2 and 16 were incorrect. The employer presented her time records which she states were kept contemporaneously with the work performed. The employer argued that her records showed that the complainant did not work the hours on certain files that the complainant had informed the Director's Delegate that she had worked. The employer also disputed the veracity of the complainant's assertion that she had worked overtime on certain days.

I am not prepared to give any weight to the records that were submitted by the employer at the appeal hearing. The Tribunal has a strict policy of not allowing such records to be entered where

the records were available during the investigation stage but not produced. (See Kaiser Stables BC EST #D058/97); (Tri-West Tractor Ltd. BC EST #D268/96). Furthermore, the appeal procedure is not an avenue to challenge findings of fact or rehash arguments made to the Director's Delegate during the investigation.

For these reasons the appeal is dismissed.

ORDER

The Determination dated February 17, 2000 is confirmed. The matter is to be remitted to the Delegate to calculate interest due from that date.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal