

**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 -

Warren Dingman  
("Dingman")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** John M. Orr

**FILE No.:** 2000/194

**DATE OF HEARING:** June 16, 2000 and July 10, 2000

**DATE OF DECISION:** July 20, 2000

**DECISION**

**APPEARANCES**

Warren Dingman	On his own behalf
Ann Wood and Dave Wood	On behalf of D.F. Wood & Associates Inc. operating as Priority Security
R.A. Stea	Delegate for the Director

**OVERVIEW**

This is an appeal by Warren Dingman ("Dingman") pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination numbered ER# 093-118 dated February 29, 2000 by the Director of Employment Standards (the "Director").

Dingman worked in the security patrol and security system sales business known as Priority Security ("Priority"). Dingman commenced work on or about June 8th 1998 and the relationship terminated August 15, 1999. Dingman claims that he was employed on a salary basis but that he did not receive any pay. The Director found that Dingman was a partner in the business and was only entitled to a share of profits and not wages.

Dingman appeals on the grounds that the Director misinterpreted the nature of the business relationship. He claims he never was a partner, never received a share of the profits, and did not receive his wages and certain commissions. Dingman also points to an inconsistency in the Director's reasoning in that another so called partner, a Mr Forsythe, was found by the Director to be an employee.

The nature of the ownership of Priority was in issue but Dave Wood was involved at least as a part owner. Dave Wood ("Wood") and his wife Ann Wood ("Ms Wood") are the sole shareholders in D.F.Wood & Associates Inc.("the corporation") which admits to being, at least, a fifty percent owner of Priority.

**ISSUES**

The central issue in this case is the nature of the working relationship between Wood, D.F Wood & Associates Inc, and Dingman. The essential point to be decided is whether Dingman was a partner in the business or whether he was an employee. A further issue is, if Dingman was an employee, what was his rate of pay.

**FACTS**

I must first note that many of the facts in this case were in dispute. Neither party kept notes or reduced the events to writing at the time. Both parties submitted extensive written and oral

evidence re-creating the events and disagreeing with each other on most points. Many of the "facts" were not before the delegate who investigated the matter but have been responses to the determination. Both parties appeared to believe strongly in their version of events and asserted that the other was lying.

The following is my finding of the events subject to certain comments about credibility and the burden of proof which will be referred to in the "analysis" portion of this decision.

Before getting into business together in 1998, Woods and Dingman were friends. They knew each other from being in the military together. When Dingman went through some marital difficulties he spent time with the Woods at their home. He had family dinners there. His daughter played with the Woods children and Ms Woods often looked after Dingman's daughter. They obviously had a fairly close friendship. It was very clear that the business differences which arose have, perhaps understandably, destroyed that friendship. There was a great deal of emotional overlay to the case presentations at the hearing that tended to obscure the ability of the parties to recall events accurately.

Dingman was previously working for another security company. He appears to have been the key man in the operation along with another sales employee called Forsythe. Wood says that Dingman was not happy in his employment and often talked about how they could set-up their own security business and make pretty good money. Dingman had the necessary licence, Forsythe had the sales contacts, but they did not have the money to open a business.

Wood was already peripherally involved IN the security business in that he had a successful electrical business which occasionally installed alarm systems. He gave the alarm monitoring business away to another company.

In the Spring of 1998 the discussions became more focused and Wood met with Dingman and Forsythe and eventually agreed to start a new security business. Wood put-up the necessary money to get the business started. Ms Wood was concerned about the financial risk involved and insisted that Wood incorporate his business. As a result, the corporation was created with the only shareholders being Wood and Ms Wood. The corporation became the vehicle through which Wood operated his electrical business and the new security business. All the finances for Priority were entered into the bookkeeping records of the corporation and were included in the year-end reports and tax returns for the corporation. The Woods hired an accountant to complete all the corporate records, reports and returns.

Forsythe and Dingman quit their employment with the other security company and the first job for Priority commenced on June 5th at The Gap store. Dingman worked on this first job but officially started with Priority on June 8th, 1998. I am satisfied that the work commenced despite the fact that the licence was not issued to the corporation until June 29, 1998.

Forsythe's situation never really worked-out and he moved on to a different company. He put in a claim to the Director that he was owed wages for the time that he worked at Priority and a determination was issued that he was an employee entitled to wages. That determination was subsequently cancelled when it was appealed by the Woods and Forsythe failed to attend the hearing. As the Forsythe matter was never heard on its merits the adjudication is not helpful in deciding this matter.

Dingman testified that the business arrangement was that Wood would own Priority through his corporation and that he, Dingman, would manage all the operational side of things. Wood was required to have a licensed manager to operate the security business and Dingman met all these requirements. Dingman did all the day-to-day work of the business including running the office, hiring and firing employees, scheduled all the hours and locations of work, and at times worked on the security patrol himself.

Dingman testified that he was employed as the manager and was to be paid a salary of \$2,000.00 per month. He says that, in addition to his salary, he was to be paid for any actual guard work that he did at the rate of \$10.00 per hour. He also claims that he was entitled to a commission on any security systems which he sold to customers.

Money was paid to Dingman from time to time as work was invoiced and paid. The Woods have submitted a number of cheques on which they have later written "100% of profit". They claim that Dingman was a partner in the business and was only entitled to a 50/50 share of the profit. There was no clear explanation why the cheques were considered 100% of the profits or why Dingman would get all of the profit.

Wood says that Priority never made any profit, that it continued to lose money. Wood testified that he invested an initial \$10,000.00 but continually had to subsidize it from his electrical work.

Neither Wood nor Dingman disclosed to the delegate any daily time record of hours worked by Dingman although there are records of the security jobs where he worked as a guard. Dingman claimed at the hearing to have detailed records of his hours worked but I declined to admit these at the hearing as they had not been disclosed previously.

An additional item arose in the course of the hearing that related to a job at St Michael's University School. This job occurred after August 15, 1999. Dingman performed the work but Wood collected and kept the money for the job without paying Dingman.

## **ANALYSIS**

As this is an appeal from a determination of the Director the onus is on the appellant, in this case Mr Dingman, to satisfy me that the determination is wrong. In a case such as this where the evidence is so conflicting it would be easy to decide the matter simply on the basis of this onus. However, in my opinion, it behoves me to endeavour to resolve the fundamental issue in this case despite the unreliability of much of the evidence.

The Woods and the Director's delegate stressed that I should consider the lack of credibility of Dingman pointing to a number of inconsistencies in his evidence at the hearing and prior submissions to the Director. While I am cognizant of a number of such inconsistencies they are insufficient for me to simply disregard all of his evidence.

On the other hand Wood avoided inconsistencies by the simple expedient of choosing not to remember. Considering that these events occurred within a year and a half before the hearing I found his lack of memory for any detail to lack credibility and to be a convenient manner of not

addressing crucial issues about what happened during the meetings leading up to the starting of the business.

I have tried to look at external factors to assess the true nature of the business relationship. Wood claims that the business was a 50/50 partnership but there is no external evidence to support that claim. The corporation's accountant testified that Dingman was not shown as an equity owner in the corporation's year-end statements or tax returns. Any payments made to Dingman are shown as expense items and not draws against earnings. The Woods have seen and been involved in the preparation of the corporate records. They did not contradict their accountant's evidence. Nowhere in the corporate records is there any indication of a partnership with Dingman. In fact the filings at *Corporate and Personal Property Registries*, which require registration of any partnerships, have no reference to Dingman as a partner.

A document signed by Wood addressed to the Security Programs Division and dated August 10, 1998 (before any dispute arose) states that Dingman will be the licensed individual responsible for "managing" the daily operations of the alarm sale division. The document also states that Priority will surrender its license if Dingman "is no longer employed" by D.F. Wood & Associates Inc (DBA Priority Security)".

The accountant says that he believed that Dingman was a partner. The Director's delegate relied in part on the accountant's information. The accountant says that this belief was based on conversations with Wood. However it defies logic that the accountant would have not included this information in the corporate records and financial statements if those were his instructions. The accountant was the financial adviser to the Woods before, during, and after the short existence of Priority. I find that his "opinion" that there was a partnership is at total odds with the actual work that he prepared for the corporation. In addition, the accountant advised Dingman to file his tax return as self-employed without providing to Dingman any statements of partnership revenue or losses.

Despite the verbal evidence of the Woods and the opinion of the accountant, there is absolutely no doubt in my mind on all of the evidence that Dingman was not a partner in the business. I am satisfied that Dingman was a manager and therefore an employee.

I am cognizant of the "Four Fold Test" applied by the Director's delegate but many of those tests are as applicable to a senior manager as an independent contractor. On the evidence before me it is clear that Dingman did not work for other people. His sole work was for Priority. Apart from the success of Priority he had no opportunity for profit or loss. He may have controlled the operations of the business but he had no say or control over the financial side of the business. I conclude that the delegate applied the proper test but perhaps did not have all of the relevant information at the time and came to the wrong conclusion.

Mr Dingman's evidence about his salary, hourly wage rate, and commissions was equally lacking in consistency and credibility. To his credit Dingman's evidence was certainly more detailed and forthcoming than Woods. However, it also appeared more planned and rehearsed. I do not believe that Wood would have been willing to pay \$2,000.00 per month as a salary as well as \$10.00 per hour on top where Dingman scheduled himself to work as a guard. I did not find Dingman to be credible on this issue and there is no external evidence that would support his allegations.

Where there is no reliable and clear evidence as to the agreed upon wage rates the *Act* requires that an employer pay the employee at least the minimum wage as provided in the legislation. I find that Dingman is entitled to minimum wage for all hours that can be established that he worked. However this is subject to the provisions of the legislation that exempt managers.

On the material before me I am not able to establish what hours Dingman worked during the time period from June 8th, 1998 to August 15, 1999.

## **CONCLUSION**

I find and conclude as follows:

1. Dingman was employed by Priority from June 8th, 1998 to August 15, 1999;
2. Priority was solely owned by D.F. Wood & Associates Inc.;
3. Dingman was employed as a manager;
4. Dingman is entitled to minimum wage for all provable hours worked subject to the provisions of section 34(1)(f) of the *Regulation*;
5. All duties performed by Dingman for Priority are to be paid at the minimum wage rate and guard duties or security patrol duties were part of his normal duties and are not to be paid as an extra item;
6. Dingman should also paid minimum wage for all provable hours of work on the St Michael's University School contract;
7. All funds paid by Wood or Priority to Dingman between June 8th, 1998 and August 15th, 1999 should be credited against the wages owing to Dingman by the corporation.
8. For additional clarity, I find and conclude that Dingman is not entitled to a salary of \$2,000.00 per month, is not entitled to \$10.00 per hour for guard work, nor to commissions on retail sales of security alarms or systems. He is entitled to minimum wage for his hours worked, subject to the management exclusions.

## **ORDER**

I order, under section 115 of the *Act*, that the Determination is cancelled *and* this matter is referred back to the Director to issue a determination based on the above findings and conclusions and an investigation of the provable hours worked by the appellant.

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**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**