

An appeal

- by -

Lorraine Harris operating as Lorraine's Private Caregiving Service
(“Harris”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Cindy J. Lombard

FILE No.: 2003A/147

DATE OF HEARING: July 24, 2003

DATE OF DECISION: October 17, 2003

DECISION

APPEARANCES

The Appellant employer, Lorraine Harris appeared and gave evidence. Also giving evidence on behalf of the employer was Lillian Macrae.

The Respondent employee, Evelyn Gurr (“Gurr”) appeared and gave evidence as did the following persons on her behalf:

Fred Wright
Marlene Parrett

The Director of Employment Standards was represented by Karen Madsen.

OVERVIEW

This is an appeal pursuant to Section 223 of the *Employment Standards Act* (the “Act”) by Lorraine Harris operating as Lorraine’s Private Caregiving Service (“Harris”) from a Determination of a delegate of the Director of Employment Standards (the “Delegate”) dated April 11, 2003 which found that Gurr was an employee of Harris during the period January 1, 2001 to December 21, 2001 and as an employee was due wages, compensation for length of service, vacation pay and accrued interest pursuant to the *Act* as follows:

1. Wages	\$17,694.43
2. Compensation for length of service	264.06
3. Vacation pay on compensation for length of service	11.36
4. Interest payable pursuant to section 88 of the <i>Act</i>	726.99
Total Due	\$18,716.84

(the “Determination”)

ISSUE TO BE DECIDED

The sole issue on appeal is whether the delegate made a reviewable error in finding that Gurr was an employee of Harris and therefore subject to the requirements of the *Act* rather than an independent contractor as asserted by Harris and therefore not a relationship which was governed by the *Act*.

FACTS

Harris operated a home care giving business. She contracts with individuals to provide twenty four hour home care such as attending to personal care, cleaning, cooking and companionship usually to elderly people. Gurr provided these services on request of Harris between January 1, 2001 and December 31, 2001.

According to Harris

Harris states that she negotiates the contract with a client. She will work the contract herself and also subcontract to others to fill in on her days off which are necessary given that the shifts are 24 hour. Harris may have contracts with more than one client at a time.

Harris asserts that Gurr was a self employed independent contractor who also worked for others at the same time she provided services for Harris and therefore the provision of the *Act* do not apply to her. Gurr, she says, was free to work elsewhere at the same time that she provided services for Harris. No specific term of employment was promised as the work ended if the client passed away which did occur from time to time.

Harris paid Gurr \$140.00 per 24 hour shift and made no deductions for income tax, CPP or EI.

Harris says that she terminated Gurr's services because she had not obtained her Long Term Care Certificate and because she was talking about her rate of pay to others who provided the same duties for Harris. She had no complaint with the quality of the work performed by Gurr.

Lillian McCrae, who gave evidence and who has provided accounting services for Harris for approximately twenty years opined that Gurr was not an employee of Harris because the work was not continuous, that is each job continued only for so long as the patient lived and ended upon death. The subcontractor had no work again until Harris obtained another client. Furthermore, care was provided for not in a care facility but in the individual's home.

According to Gurr

Gurr says that when she applied for work with Harris that Harris did tell her that the work was contract work. Gurr was paid a daily rate of \$140.00 per 24 hour period.

During the time that Gurr provided services for Harris she cared for Mrs. Wise. Previously for a number of months in 1999/2000 she had worked caring for Mr. C. who passed away and that job ended.

During the time that she cared for Mrs. Wise, Gurr also had other work which she had obtained on her own including caring for a Mrs. M as well as some part time work for another lady cooking and cleaning. Gurr says that she scheduled this work around the work that she did for Harris.

In the case of the services provided for Mrs. Wise, Gurr says that:

- Harris scheduled the hours of work
- Harris would post a list of duties on the cupboard at Mrs. Wise's home, including specifying when meals were to be served, what client needs done that day, etc.
- Harris was provided with a bedroom at the Wise residence
- if Gurr could not work a shift, she had to contact Harris who arranged for a replacement worker
- if there was any difficulty with the client personally while working Gurr was to telephone Harris

With respect to the termination of her services, Gurr says that Harris did tell her in approximately February, 2002 that it was a government requirement that she have a Long Term Care Aid Certificate. Gurr says that she did want to obtain one and asked Harris for a copy of the letter from the government in order that she could show it to her counselor at the college because the counselor had told her that she had not heard of this requirement. Harris did not provide the letter and Gurr was unable to take the course right away because she first had to complete some prerequisites.

By letter dated May 4, 2002, Gurr was terminated by Harris. The letter makes no mention of the certification requirements but rather alleges that Gurr had been discussing her wages with another employee of Harris.

Fred Wright, who resides with Gurr, gave evidence that Harris called their residence constantly to schedule Gurr.

Marlene Parrott gave evidence on behalf of Gurr. Ms. Parrott worked for Harris for three months, February, 2002 to April, 2002. She had answered an ad in the newspaper and was paid \$150.00 per 24 hour period. Ms. Parrott did have her long care term certificate at the time.

CONCLUSION OF FACTS AND ANALYSIS

In determining whether the delegate made a reviewable error in finding that Gurr was not an employee and therefore not subject to the requirements of the *Act*, the onus is on the appellant, Harris, to show on a balance of probabilities that the delegate made a reviewable error in finding that Gurr was an employee. Reviewable grounds are specified by Section 112(1) of the *Act* to be as follows:

- a) the delegate erred in law;
- b) the delegate failed to observe the principles of natural justice;
- c) new evidence has come available since the making of the Determination

Ground b) was not raised on this appeal nor was there any evidence raised which would bring this ground into question.

With respect to ground a) the parties were both unrepresented and in order to achieve a fair hearing both evidence as to the facts relied upon by the delegate and other evidence was heard. This “airing of the facts” was necessary both in order to determine whether there was any new evidence apart from that “on the record,” that is, in the Determination and any documentation relied upon by the delegate in coming to the Determination, and also in order to decide whether there was any error of law, a question that many legally trained persons find difficult to answer let alone a lay litigant. This interpretation of section 112 is consistent with one of the purposes of the *Act*, that is, as set out in section 2:

- a) to “promote the fair treatment of employees and employers”
- d) to “provided fair and efficient procedures for resolving disputes over the interpretation and application” of its provisions.

EMPLOYER V. INDEPENDENT CONTRACTOR – THE LAW

Section 1 of the *Act* sets out the definition of “employee” and “employer” as follows:

“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;

The traditional test used by the Courts to distinguish between an employee/employer relationship and that of an independent contractor has centered on the question of the degree of control exercised by the person to whom the work is being done for over the person doing the work. Important but not all-inclusive factors are:

- 1) Does the employer have the control or direction of the employee in the sense of a traditional master/servant relationship? Did Harris control of the “what” and “how” of the work Gurr performed?
- 2) To what extent is the person integrated into the business?
- 3) Was Gurr in business for herself or working for Harris who has the chance of profit or loss?
- 4) Who owns the tools?
- 5) Was Gurr required to perform general work or to complete a specific job at which time her relationship with Harris was to come to an end?

See for example: Re: Castlegar (1988) Ltd., (1991) 84DLR (4th), 58 BCLR (2d) 341 (BCSC).

I have concluded that the Delegate made no error in finding that the relationship of Gurr and Harris on a balance of probabilities was that of employer/employee. Unlike the work that Gurr did directly for “Mrs. M”, Harris had the control and direction of the work she did for Mrs. Wise, that is, she:

- a) scheduled the hours and only she could authorize any charges;
- b) specified her duties while at Mrs. Wise’s home;
- c) Harris expected to deal with any difficulties herself which might arise;
- d) kept holiday monies paid Wise for Gurr

Furthermore, it was Harris who had the chance for profit paying Gurr a flat daily rate and keeping the excess paid by her clients.

While Gurr was performing a specific job for Harris, that is caring for Mrs. Wise, if that contract were to come to an end as long as Harris had other clients, Gurr's employment would have continued.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated April 11, 2003, is confirmed.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal