

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-

Robin Heringa  
(the "Appellant")

-of a Determination issued by-

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** E. Casey McCabe

**FILE NO.:** 98/199

**DATE OF HEARING:** June 5, 1998

**DATE OF DECISION:** July 10, 1998

**DECISION**

**APPEARANCES**

Lorne Herlin	for Robin Heringa
Robin Heringa	for himself
Jervis Rodriguez Appointed Receiver	for Price Waterhouse, Judicial Trustee and Court

**OVERVIEW**

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "Act") by Robin Heringa of a Determination dated March 11, 1998 which dismissed an application under the Act by the appellant for payment of salary from June 17, 1997 to July 24, 1997. The appellant claimed that for that period of time he was employed as an employee in the client services division of Eron Mortgage Corporation (Eron) at a salary of \$2,500.00 per month. The Director's delegate determined that the appellant's employment relationship with Eron was that of a sub-mortgage broker which commenced on July 22, 1996 and continued through to October 3, 1996 when Price Waterhouse was appointed as Judicial Trustee and Court Appointed Receiver. The Director's delegate determined that there was no documentary evidence that the complainant had been hired as a client services representative and therefore was unable to find that wages were owing to Mr. Heringa.

**ISSUE TO BE DECIDED**

1. Was Mr. Heringa an employee pursuant to the definition of the Act from the period of June 17, 1997 to July 24, 1997?

**FACTS**

Eron Mortgage Corporation's license to operate in the Province of British Columbia was suspended by the B.C. Registrar of Mortgage Brokers on October 3, 1997. Price Waterhouse was subsequently appointed as a Judicial Trustee and Receiver. Eron's financial accounts were frozen.

The complainant commenced employment with Eron on July 22, 1996 as a sub-mortgage broker. He was paid on a commission basis. For the period of his employment with Eron he earned approximately \$30,000.00 in commissions. The financial records entered as evidence indicate that one of those commission payments in the amount of \$530.81 was made on July 11, 1997 while Mr. Heringa claims he was working as a client services representative. There was no documentation available to indicate that Mr. Heringa was

paid salary in the amount of \$2,500.00 per month during the period of June 17, 1997 to July 24, 1997. Mr. Heringa was one of thirty-five mortgage sub-brokers employed by Eron.

Mr. Heringa testified that although his sub-mortgage broker employment contract with Eron was dated July 22, 1996 he actually did not commence employment until September 1996. He worked as a mortgage broker. His primary duties included selling of the employer's product i.e. seeking people who were willing to invest money in mortgages and mortgage financing. As a mortgage sub-broker Mr. Heringa worked out of the employer's head office on Burrard Street in Vancouver. The mortgage brokers had a specific area of the office in which they were located. They had some discretion in setting their own hours of work. They were paid on a commission basis of 3.5% sales less 30% for expenses for a net commission of approximately 2.45%.

Mr. Heringa testified that in June of 1997 Eron, in response to an increasing number of inquires from investors regarding recent changes in Eron's method of paying its investors a return on their investments, created a client services division. Mr. Heringa testified that six mortgage sub-brokers were selected by Mr. Frank Biller to serve as client services representatives. Mr. Heringa testified that he and the other five individuals were informed at a meeting on June 17, 1997 that they were being assigned to the client services department at a salary of \$2,500.00 per month. Mr. Heringa testified that they were not given any choice in this assignment. They were told that they could continue to service their existing client base but that they would not be assigned nor were they expected to recruit new clients. Mr. Heringa testified that Eron circulated an undated memorandum addressed to Eron Investors entitled Eron Client Services Division at this time.

The memorandum stated in part:

"The purpose of this new division is to help fulfill client needs for improved communications through direct contact, and create a fast and accurate way to receive important information.

Our Client Services Division is now able to provide you with current information generated from our new P.I.C. computer system. This computer system will also allow some questions to be answered "on-line", and can be used for instant account updates and reports.

Should you wish to contact our new Client Services Division, simply call our main phone number (604) 669-5087 between 9:00 a.m. and 5:00 p.m. any working day and ask for Client Services. Our client service representatives will be pleased to answer any questions you may have with respect to the administration of your investment – such as details of Term Sheets, Interest Rates, Interest Payments, Status of various Documentation (E.G. Declarations), and for that matter, and other information you would like to have on any of the investments in which you have participated . . .

Please keep in mind that the Client Services Division is primarily set up to answer any questions of an administrative issue – for any information on a

project itself, or on a new mortgage, please continue to refer to your broker.  
.."

The creation of a client services division was also announced at a meeting held at the Hyatt Regency Hotel on June 17, 1997.

Mr. Heringa testified that he commenced duties as a customer service representative immediately. He testified that he was put on set hours of 8:30 a.m. to 4:30 p.m. However, the customer service representatives were expected to be at the work place at 8:00 a.m. to attend a daily meeting. They were allowed to service their existing client base but this had to be done in hours outside of their new regular work hours. The customer service reps were moved out of the broker's office area and into an area devoted solely to customer services. They were informed that they would be paid a salary of \$2,500.00 per month. Although there was no formal policy manual certain administrative procedures were initiated. One of those procedures required the client services representatives to record each call that was fielded by him. A form was devised for the representative to fill out. The form required the representative to record the date and time of the call, the client's name, the mortgage that was the subject of the call, the amount of the investment, the date of the investment, the specific problem, the comments made by the client's services representative, the supervisor or superior officer that any action was assigned to and the response given. Mr. Heringa testified that each of the representatives kept his individual records and that all records were kept in a binder. The Receiver indicated that it was not able to locate such a binder in Eron's records. However, Mr. Heringa was able to produce a copy of a client services form that he completed on June 18, 1997.

Mr. Heringa testified that his duties changed substantially when he became a customer service representative. He was no longer engaged in selling the employer's product. He was now working regular office hours in an administrative capacity. He speculated that he had been chosen for this assignment because of his educational background and the fact that his commission sales were not stellar. Indeed, it appears that the amount of monthly salary that was to be paid to the customer services representatives equaled approximately the amount of money, on monthly average, that Mr. Heringa was otherwise earning. Mr. Heringa further testified that he and one of the other client services reps were removed from the client services department on July 24, 1997 while the remaining four original candidates continued in that department.

The submission of the Director's delegate indicates that he could find no documentation to support Mr. Heringa's claim that he was an employee during the stated period. Rather, the evidence indicated that those persons who were employees of Eron had their payroll administered through a payroll administration contractor. There is no indication in those records that Mr. Heringa or the other five client service representatives were ever listed on the payroll. However, records that were subsequently produced pursuant to a demand for production of documents made by counsel for Mr. Heringa indicated that the other five customer service representatives were indeed paid cheques at various monthly intervals in the amount of \$2,500.00 from a corporation known as Eron Financial Services which was, apparently, a corporation that one of the principal's of Eron used to pay himself and other

lump sum personal contractors. These documents were not available to the Director's delegate in his initial investigation.

The documents are helpful because they show that the other five mortgage sub-brokers who Mr. Heringa testifies worked in the client services department were paid \$2,500.00 on various occasions as well as certain sums listed as commission. I note this because I think it is consistent with Mr. Heringa's testimony that the six brokers were allowed to service their existing client base during the time that they were seconded to the client services division. It is also notable that the payroll records including photocopies of cancelled cheques that were produced pursuant to the request for documents indicate on the face such comments as "client services – wages"; "salary"; or simply "client services".

Mr. Heringa was asked in cross-examination about efforts he had made to secure payment of his outstanding wages. He answered that he had consistently raised the issue with his supervisor and with Mr. Biller. He testified that he was told that his cheque was being processed and that it would soon be forthcoming. However, after two months of being given this excuse but no cheque he wrote, on September 24, 1997 to Mr. Curt Lehner with a c.c. to a Ms. Theresa Brustolin stating:

"It has now been over 2 months since I worked in client services and this salary was due. I would appreciate your prompt attention to this matter.

1. Tuesday June 17 to June 30	=	10 working days
2. July 1 to July 24	=	<u>18 working days</u>
		28 working days
28 working days x \$1.25/Day	=	\$3,500.00 due

Thank you for your consideration.

Yours truly,

R.A. Heringa"

To support his appeal Mr. Heringa produced Statutory Declarations sworn by two of the other brokers who were transferred to the client services department. Those deponents stated in their affidavits that they were colleagues of Mr. Heringa and that they worked with him in the client services division at a salary of \$2,500.00 per month. It is notable that the documents that were produced pursuant to the request by counsel indicated that these deponents were paid a flat sum of \$2,500.00 with no deductions on various dates. The documents also show that the payments to these deponents were not shown in the regular payroll records administered by the contractor. The regular payroll records indicated source deductions were made for the regular payroll employees.

## ANALYSIS

The question in this case is whether Mr. Heringa was an employee during the period of June 17, 1997 through July 24, 1997. The *Act* defines employee 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;

I accept the principles set out in *Goldsmith Enterprises Ltd.* (BCEST 041/97) that an individual may still be an employee under the *Act* even though the employer is making no deductions at source. I am satisfied that the direction and control exerted by Eron over the customer services representatives in the determination of their working hours, the nature of their duties which were fundamentally different from that of a sub-mortgage broker, the location of the client services department on the premises of the employer, the employer's supply of office materials and support personal and the important nature of the duties (which were to inform and assure investors that the policy changes were in their best interest) formed a functional integration of that department with the whole of the employer's operation. I further find that there was no chance of profit or risk of loss by the employees working in the client services division. I find that those persons who were seconded to the client services division from the mortgage sub-broker category were employees.

The real question is whether Mr. Heringa was one of those employees. Mr. Heringa testified that he was. He offered statutory declarations from others who deponed that they worked with Mr. Heringa in the client services division. Unfortunately, there are no records to indicate that Mr. Heringa worked in that division in the same sense that there are records that indicate the others did. However, it must be born in mind that that is the precise reason why Mr. Heringa filed his complaint.

I am not prepared to accept the Statutory Declarations, standing alone, as proof of Mr. Heringa's employment in the client services division. They are hearsay in nature. The deponents were not subject to cross-examination. However, there is a body of corroborating evidence. That evidence includes the undated memorandum that was circulated to each investor explaining the purpose and creation of the client services division; the memorandum dated July 24, 1997 explaining the delivery of interest payment cheques and how the interest reserves worked; the client services form that was filled out by Mr. Heringa which sets out the nature of a problem reported by a client investor and the action taken; the letter dated September 24, 1997 from the complainant to Mr. Curt Lehner demanding payment of his outstanding salary; the copies of the cheques to the other employees indicating, variously, that these cheques were for salary, or client services –

wages, or simply client services. Furthermore, the ledger sheets for the various employees showed entries in that period from June 17, 1997 through September 29, 1997 for sums of \$2,500.00 or \$5,000.00, depending on the person, plus commission payments. For the above reasons I find the evidence, including Mr. Heringa's testimony, consistent with the probability that he was engaged as an employee in the client services department for the period of June 17 through July 24, 1997 at a salary of \$2,500.00 per month. It should be noted that much of the evidence on which I have based my finding was produced pursuant to the demand for documents made by legal counsel and, in my belief, was not evidence or information that was available to the Director's delegate at the time he wrote his Determination.

In summary I accept that the complainant was an employee in the client services division of Eron Mortgage Corporation for the period of June 17 through July 24, 1997. I further accept that his salary was set at \$2,500.00 per month. I base this finding on evidence that was presented to me that is new evidence in the sense that it was not information that was readily available to the Director's delegate when he was doing his investigation and writing the Determination. There is no doubt that at the time of the appointment of the Receiver Eron's office was in turmoil and that people who might have otherwise been helpful were not present during the investigation by the Director's delegate.

**ORDER**

The Determination dated March 11, 1998 is cancelled. The matter is remitted back to the Director's delegate for the calculation of wages owing including statutory holiday pay and interest.

**E. Casey McCabe  
Adjudicator  
Employment Standards Tribunal**