

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 -

F.O.R.E. Marketing Canada Inc.
("FORE")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE N_{O.}: 1999/262

DATE OF H_EARING: July 30, 1999

DATE OF D_ECISION: August 8, 1999

DECISION

APPEARANCES

for the Appellant	Eugene Casavant Dwight Ergang
for the individual	in person
for the Director	Ken Copeland

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by F.O.R.E. Marketing Canada Inc. (“FORE”) of a Determination which was issued on April 14, 1999 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded FORE had contravened Sections 18, 45, 58 and 63 of the *Act*, ordered FORE to cease contravening the *Act*, to comply with its requirements and pay an amount of \$5,139.37

FORE says the Determination is wrong in its conclusion that the complainant, Catherine Hamilton (“Hamilton”), was an employee under the *Act* and, if she was an employee, in its conclusion that annual vacation pay and statutory holiday pay were included in her hourly wage rate.

ISSUES TO BE DECIDED

The main issue is whether Hamilton was an employee under the *Act*. If she was an employee under the *Act*, there is a second issue about whether her wage entitlement has been properly calculated.

FACTS

A preliminary discussion with the parties revealed that there was no dispute on the essential facts and the material on the file, supplemented by brief submissions from the parties at the hearing, provided the basis for the conclusions in this decision. At the outset, I commend all the parties at the hearing for their courtesy and cooperation.

Very generally, FORE is a multi-level marketing company which works with distributors to provide and arrange leisure vacations. In January, 1998, FORE hired Hamilton as an office assistant. At the time of her hiring there was a discussion between her and David Hall, who was then the president of FORE, about whether her relationship with FORE would be that of employer/employee or independent contractor/client. Hamilton says she indicated her choice was to be an employee of FORE, but Mr. Hall decided she would be considered an independent contractor and she agreed. A services contract was prepared by FORE and signed by Eugene Casavant, Vice President Operations, on behalf of FORE and by Hamilton. The services contract was between Catherine Hamilton Office Services (although no such entity existed) and FORE. The document listed the duties and responsibilities of the office assistant under six headings: Communication, Secretarial, Record Keeping, Financial Services, General Office and General. The preamble indicated the list is inclusive. There were other duties added. The services contract contained the following paragraph:

The position of Office Assistant will work under the general supervision of the Executive Assistant and the Vice President Operations. It shall report to and take direction from the Vice President Operations through the Executive Assistant for day to day operations. The President of the Company may give direction when present and in the absence of the Vice President.

The services contract included terms relating to value of services, \$12.00 an hour, and hours of work, 37 ½ hours a week (although she actually worked 40 hours a week) from 9 to 5 daily. Hamilton was later given the title of Office Manager and her rate of pay changed.

Hamilton was paid bi-weekly and submitted invoices to FORE, at their request, for each two week period during the time she worked there. The relationship was ended by FORE on September 17, 1998. Because of financial difficulties, Hamilton was not paid from May 20, 1998 to the end of the relationship.

ANALYSIS

An analysis of whether a person is an employee under the *Act* starts with the language of the *Act*. Also, when considering whether a person is an employee, the remedial nature of the *Act* and the purposes of the *Act* are proper considerations. While ultimately it is the language, the remedial nature and the purposes of the *Act* that will be determinative, there are several common law tests that provide a helpful guide because these they identify factors within the relationship that help to characterize it as an employer/employee relationship or one of independent contractor/client. In this case, factors such as control, ownership of tools, chance of profit, risk of loss and the degree of integration of the work being performed by Hamilton into the business of FORE all strongly point to a conclusion that, at law, Hamilton would be considered to be an employee, not an independent contractor.

In respect of the *Act*, the language used to define “employee” and “employer” for the purposes of the *Act* is found in Section 1 of the *Act*:

“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 with 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, either directly or indirectly,
for the employment of an employee;*

Those definitions are inclusive. Hamilton's relationship with FORE is quite comfortably encompassed by those definitions. The key elements in this case are that the work performed by Hamilton is typical of work normally performed by an employee and FORE had considerable control and direction of Hamilton in respect of the work she performed and how and when it was performed.

The purposes of the *Act* are set out in Section 2. The *Act* is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtlinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) And *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.). I specifically note the following comment from *Machtlinger v. HOJ Industries Ltd.*, *supra*

. . . an interpretation of the *Act* which encourages employers to comply with the minimum requirements of the *Act*, and so extends its protection to as many employees as possible is favoured over one that does not.

In all the circumstances, I agree with the conclusion of the Director that Hamilton was an employee under the *Act* and this ground of appeal is dismissed.

FORE's second ground of appeal relates to the calculation of her wage entitlement in the event she was an employee under the *Act*. FORE says the calculation of the total wages owed is incorrect because it did not take into consideration that the hourly rate agreed to was all inclusive of any statutory obligations, which, they said included the obligations under the *Act* to pay annual vacation and statutory holiday pay. The issue of whether all inclusive wages schemes are allowed by the *Act* has been analyzed by the Tribunal in *W.M. Schulz Trucking Ltd.*, BC EST #D127/97 and *Foresil Enterprises Ltd.*, BC EST #D201/96. It was decided in those cases, and that conclusion has been applied in other cases, that all-inclusive wage schemes do not comply with the *Act*. In the *W.M. Schulz* case, the Tribunal referred to a Supreme Court decision, *Atlas Travel Service v. Director of Employment Standards*, unreported, October 24, 1994, Vancouver Registry (B.C.S.C.), that had considered the same issue under the predecessor to the *Act*, stating:

. . . the Court recognized the inclusion of annual vacation and statutory holiday pay in an "all inclusive" wage structure did not comply with the statutory scheme which requires annual vacation and statutory holiday pay to be calculated on total wages and paid as something in addition to total wages. Under the employer's wage structure in that case, as in this, the employer would never pay annual vacation pay on total wages, but only on the regular wage portion of total wages. This would result in less than the required statutory benefit being paid. This result is sufficient, standing alone, to conclude the *Act* prohibits the type of wage structure imposed by Schulz Trucking.

FORE placed some reliance on the services contract in making their argument on this ground of appeal, noting that the agreement says the remuneration provided was "all inclusive" and that Catherine Hamilton Office Services "was responsible for any statutory obligation to its employees". In light of Section 4 of the *Act* that agreement can have no effect on minimum statutory requirements, including the requirements to pay annual vacation and statutory holiday pay on total wages.

This ground of appeal is not accepted.

ORDER

Pursuant to Section 115 of the *Act*, the Determination is confirmed in the amount of \$5139.57, plus interest on that amount pursuant to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal