

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 -

Dr. Thomas M. Konkin, operating as Town Square Medical Clinic
("Town Square")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/329

DATE OF HEARING: August 23, 1999

DATE OF DECISION: September 10, 1999

DECISION

APPEARANCES

Dr. Thomas M. Konkin	on behalf of Dr. Thomas M. Konkin operating as Town Square Medical Clinic
Stephanie Douglas	on her own behalf
Aloma Douglas	on behalf of Stephanie Douglas

OVERVIEW

This is an appeal by Dr. Thomas M. Konkin (“Konkin”) operating as Town Square Medical Clinic (“Town Square”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated May 6, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). Town Square alleges that the delegate of the Director erred in the Determination by concluding that the complainant Stephanie Douglas (“Douglas”) was an employee and therefore entitled to wages in the amount of \$347.41 (includes interest).

Town Square was also assessed a penalty of **zero dollars (\$0.00)** for the contraventions of the Act as set forth in the Determination.

ISSUES

The issues to be decided in this appeal are:

1. Was Douglas an employee pursuant to the provisions of the *Act* ?
2. If Douglas is found to be an employee, is she owed wages in the amount calculated by the delegate of the Director and set forth in the Determination ?

FACTS

The following facts are not in dispute:

- Douglas attended at the premises of Town Square on a number of occasions between October 23 to November 6, 1998;
- Douglas did not receive any compensation from Town Square for this period of time;
- Helen Bosch (“Bosch”) provided a letter to Douglas which stated in part “..*This letter is to confirm that Stephanie Douglas will be working part time at the above named clinic to fill a maternity relief position for approximately six months.*”
- Town Square did not keep any record of the hours that Douglas was in attendance;
- Douglas kept a record of the hours she attended at Town Square’s premises;

Dr. Thomas M. Konkin (“Konkin”) testified that:

- he does the hiring and firing for Town Square and, until this hearing, he had never met Douglas;
- he was not at Town Square very much of the time, actually Dr. Marsh spends the most time in the office;
- he does not know whether or not Mrs. Aloma Douglas visited the offices of Town Square and observed her daughter at work;
- Douglas was “brought on with several other women who responded to an advertisement to provide maternity relief”;
- Douglas was told she was being evaluated for a position;
- Douglas was not told she was being hired;
- Douglas did appear at Town Square for seven days for varying hours to observe what was going on;
- Douglas was asked to perform some tasks and was unwilling to do so;
- in his view “training” presumes some willingness to be trained but no willingness was evident;

Letters from Helen Bosch (“Bosch”), Kari McKenzie (“McKenzie”) and Dr. R. Marsh (“Marsh”) were submitted in support of the position of Town Square as set forth by Konkin.

Bosch stated that:

- the letter for Douglas which confirmed employment was written upon the insistence of Douglas;
- she presumed that Douglas would be hired following the evaluation;

- according to the Town Square's daysheets, Douglas attended a total of eight days;
- Douglas was informed at the outset that she was being evaluated on her MOA skills, not trained;
- payroll records and hours were not kept as Douglas had not been hired;
- she found that Douglas was reluctant to perform simple tasks and was for the most part uninterested and unwilling to do anything more than computer registration of patients and entering their names on the daysheet;
- on her last day, Douglas was presented with a written evaluation and a verbal explanation of why she was found to be unsuitable for the position.

McKenzie stated that:

- Douglas 'shadowed' her on one occasion;
- she found Douglas to be unmotivated towards general office tasks;
- Douglas spent the majority of her time observing and in the staff room eating;
- Douglas did enter patients on the daysheet and escorted one patient to the examining room only after being strongly encouraged to do so;

Marsh stated that:

- he observed Douglas being shown the operation of the office during several days;
- Douglas did not assist him at any time;
- he did not observe Douglas doing any work on her own or contributing to the office operation;
- at no time did Douglas relieve any of the staff of ongoing regular duties;
- Douglas' mannerisms were totally unsuitable for the duties of dealing with patients;
- Douglas was not being trained nor did she replace the duties of present staff;
- Douglas' suitability for hiring was being assessed.

Douglas testified that:

- she faxed off a bunch of resumes and was contacted by Bosch who told her about the job opportunity at Town Square;
- Bosch asked her if she was interested in the job as no one else was due to the small amount of hours being offered;

- she had an interview with Bosch and then went through the other resumes received as Bosch advised her why the other applicants would not be acceptable;
- she asked Bosch for the letter of confirmation of employment by telling Bosch “If I have the job, I need the letter for clothing allowance.”
- Bosch provided the letter of confirmation of employment; she believed she was being hired and Bosch even gave her a key to the office;
- she kept track of the hours she worked;
- she advised Bosch from the beginning that she (Douglas) had limited experience as she had never worked as a MOA, merely had done a practicum;
- during her period at Town Square, she did a number of different tasks such as:
 - billing
 - pregnancy tests
 - worked the autoclave
 - did WCB forms
 - did data entry
 - pulled charts and files
 - escorted patients to examining rooms
- in the written evaluation, Bosch advised her that her telephone manners were really great;
- she currently works in a medical clinic in Vancouver and has done so since December 1998.

Aloma Douglas (“A.Douglas”) testified that:

- she would drop Douglas off at work and then pick her up at the end of the day;
- at first she would go up to the offices of Town Square and observe Douglas working while she waited for Douglas to be finished;
- she observed Douglas working with a number of patients;
- on the way home after work, Douglas would tell her all about what had happened that day at work;
- when Douglas got the letter confirming her employment, Douglas was very excited and the two of them went shopping for clothing;

The delegate of the Director stated in the Determination and in her submissions to the Tribunal that:

- “during the course of the investigation, Helen Bosch Office Manager, was interviewed. Bosch stated that Douglas had performed work that would normally have been done by an employee, such as data entry of client information, escorting patients to examination rooms, as well as being trained

to perform pregnancy tests. Bosch further stated that she scheduled Douglas' hours and determined whom she was to work with. Bosch further stated she did not retain the schedule of hours that Douglas worked. Bosch finally stated that she had not informed Douglas that others were being evaluated for the position."

- "It is clear that Douglas performed work that would normally [be] done by an employee of Town Square under the direction and control of Helen Bosch, Office Manager. Consequently, she was an "employee" as defined in the Act, and is therefore entitled to be paid minimum wage for all hours worked."

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, Town Square.

Section 1 of the *Act* defines 'employee' as:

"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;*

The appeal of Town Square revolves primarily around their contention that Douglas was not an employee as she was not being *trained* rather she was being *evaluated* with respect to her suitability for employment.

In my view, whether Douglas was being "trained" or "evaluated" makes no difference in these circumstances especially when considering the context of the definition of 'employee' as contained in the *Act* to the facts.. There is no dispute that Douglas performed *some work* which was normally performed by employees of Town Square, such as entering client information on the day sheet, escorting patients to examination rooms and, according to information provided by Bosch to the delegate of the Director, being trained to perform pregnancy tests. Douglas was in attendance at the premises of Town Square for a period of 9 days. I find it simply not credible that she could have been there for that

period of time and not performed any work whatsoever else how could Town Square expected to have evaluated her suitability.

The evidence of Konkin on behalf of Town Square was of little assistance to the panel in this matter as he stated “he does the hiring and firing for Town Square and, until this hearing, he had never met Douglas” and further stated “he was not at Town Square very much of the time, actually Dr. Marsh spends the most time in the office”.

It is unfortunate that those who provided statements on behalf of Town Square in this matter, Marsh, Bosch and McKenzie, were not in attendance at the hearing so the veracity of their statements could be ‘tested’ under cross examination. The statement of Bosch for example, in attempting to explain why the letter confirming Douglas’ employment was issued, is inconsistent with the information supplied to the delegate of the Director during the investigation. Bosch does not however in this statement, challenge her earlier information to the delegate of the Director that Douglas was not told that others were also being evaluated for the position as she (Bosch) did not feel it was necessary to tell her (Douglas).

The statements of Marsh, Bosch and McKenzie to the Tribunal in support of the appeal are at best, hearsay evidence and, where those statements are contrary to the direct evidence provided by Douglas, I prefer the evidence of Douglas.

It is further important, in my view, to note that while the issue of Bosch’s letter confirming employment was brought to the attention of Town Square in a letter from the delegate dated March 22, 1999, Town Square did not respond to that issue until after the Determination was issued on May 6, 1999.

For all of the above reasons and, on the balance of probabilities, I conclude that Douglas was an employee of Town Square.

Town Square kept no payroll records or hours worked with respect to Douglas, therefore it is appropriate that the records provided by Douglas to the delegate of the Director be considered. Town Square did not provide any substantive evidence with regard to the hours claimed as worked by Douglas therefore, I accept Douglas’ record of hours worked as accurate.

I conclude therefore, that Douglas is entitled to wages in the amount as calculated by the delegate of the Director and set forth in the Determination.

Town Square provided no evidence or submissions with respect to the zero dollar penalty imposed by a delegate of the Director.

The appeal by Town Square is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated May 6, 1999 be confirmed in all respects for the amount of **\$347.41** together with whatever further interest may have accrued pursuant to Section 88 of the *Act* since the date of issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal