

An appeal

- by -

Jean Tharp  
("Appellant")

- 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:** Ib S. Petersen

**FILE No.:** 2002/312

**DATE OF HEARING:** September 3, 2002

**DATE OF DECISION:** September 9, 2002

## DECISION

### APPEARANCES:

Ms. Jean Tharp on behalf of herself

Ms. Cheryl Holmes on behalf of herself

### OVERVIEW

This is an appeal, pursuant to Section 112 of the *Employment Standards Act* (the “Act”), of a Determination of the Director’s Delegate issued on May 16, 2002 (the “Determination”). In the Determination, the Delegate concluded that the Appellant was not an employee of Ms. Holmes operating as Calendar Club. Rather, she was an independent contractor.

The background facts may briefly be stated as follows. Ms. Holmes, the Respondent, operates as an independent agent for the Calendar Club of Canada Ltd., partly owned by Indigo Books. Her territory is British Columbia, except Vancouver Island. The business is seasonal, approximately eight weeks per year, operating retail kiosks in various shopping malls throughout the province, selling calendars and other products. The business has been in operation for 9 years and there were some 28 kiosks.

Ms. Tharp worked or provided services for four seasons for the Calendar Club. In her first season, it is agreed, she was hired as an employee. In the last three seasons, she worked under a management contract. Ms. Tharp was to be compensated at the rate of 10% of net sales. At issue in the Determination is the 2000-2001 season, November 12, 2000 to January 7, 2001. Ms. Holmes told the Delegate that Ms. Tharp had the option of being an employee at a monthly rate with set hours or an independent contractor, remunerated through commission. Ms. Tharp denies that she was given such a choice. Ms. Tharp was not required to personally perform the services and had the freedom to hire and pay her own employees as she saw fit. The Delegate accepted that there were certain restrictions, including the location of the kiosks and mall opening hours, and that the equipment and product was supplied by Holmes.

The amount in dispute is around \$800 for vacation pay and wages. In part, the dispute around wages is based on “shrinkage” deducted in accordance with the agreement between the parties.

### FACTS AND ANALYSIS

The basic issue to be resolved is whether the Delegate erred in concluding that Ms. Tharp was an independent contractor. The Appellant has the burden to persuade me on the balance of probabilities that the Determination is wrong. Briefly put, I am of the view that she has not met that burden.

The application of the statutory definitions of “employee” and “employer” is not as easy or simple as one might have expected. In my view, a useful summary is set out in the decision in *Knight Piesold Ltd.*, BC EST # D093/99:

“Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional

void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and “integration” (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. Employment Law in Canada (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, [1947] 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of “whose business is it”.

In the Determination, the Delegate considered the facts, primarily in light of the so-called “four-fold” test:

- the kiosk was operated seasonally, for a specific period;
- there were some restrictions as to where, when and how the work was to be performed, at a location in the shopping mall during its opening hours;
- Ms. Tharp was engaged pursuant to a management agreement;
- Ms. Holmes supplied all equipment, supplies and product (the Delegate considered that this degree of control was more akin to a franchise relationship);
- Ms. Tharp controlled the hiring of the employees necessary to staff the operation, set their hours and schedules;
- Ms. Tharp trained the employees;
- Ms. Tharp paid the employees and did not report their identity or hours of work to Ms. Holmes;
- Ms. Tharp did not have set hours--indeed, she did not have to work any hours at all;
- Ms. Tharp had a chance for profit and risk of loss, though her control of the number of employees and other expenses;
- Ms. Tharp was able to sell merchandise at a discounted rate.

Some of these facts weighed in favour of Ms. Tharp being an employee. The Delegate noted that, in her view, the management contract, and the fact that Ms. Holmes supplied all equipment, supplies and product, at first blush, were indicative of an employment relationship. However, on balance, the Delegate concluded that “the overall picture” revealed that Ms. Tharp was an independent contractor

The Appellant says that the Delegate did not put enough weight on the degree of control exercised by Ms. Holmes, which she says was “total control.” With respect, I do not agree. The evidence presented at the hearing confirms the Delegate’s findings of fact and are supportive of the conclusion that Ms. Tharp exercised a considerable, if not unfettered, control. At the hearing, the Appellant’s own testimony in cross examination--and I add that the evidence in direct was scant and lacking in particulars--was that she trained, hired and paid her own employees; that Ms. Holmes did not control who these employees were; that she set their hours; that she--herself--was not required to work any hours; that the employees were paid out of her revenues (i.e., the percentage she received); and that she could request products directly from the Calendar Club.

While the Determination arguably falls, perhaps, a little short on analysis, I am not convinced on the balance of probabilities that the Delegate erred. These determinations are rarely, as, I think, is suggested by the Appellant, “black and white.” The Delegate is required to look at the substance of the relationship,

not the “label” attached to it by the parties, in light of the various common law tests, the statutory definitions, and the principles generally applied to remedial statutes such as the Act. In my view, one of the hallmarks of an employment relationship is the personal performance of the services. In the case at hand, the Appellant was not required to personally perform the services: indeed, she was required to ensure that the kiosk was staffed, by her employees, during mall hours. She was not required to do any of the work herself. In my view, in light of all of the facts and circumstances, this tips the scale in favour of an independent contractor relationship.

In short, on the evidence before me, I am of the view that the Appellant has failed to discharge the burden to show that the Delegate erred and, therefore, the appeal fails.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determinations in this matter, dated may 16, 2002 be confirmed.

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**Ib S. Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**