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 -

Brenda Godby operating as Miranda Mills
("Godby" or the "Employee")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/294

DATE OF DECISION: October 4, 1999

DECISION

SUBMISSIONS

Ms. Brenda Godby	on behalf of the Employer
Ms. Julene A. Widiner	on behalf of her self
Mr. Murray N. Superle	on behalf of the Director

OVERVIEW

This is an appeal by Godby pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on June 3, 1999.

The essential facts are set out in the Determination. Widiner was an employee of the Employer, which operated a clothing manufacturing and retail operation in Vancouver, between November 1997 and July 1998. She employed at an hourly rate of $8.00 and $10.00. She complained that the Employer had not paid all her wages and supplied records of hours worked and amounts paid. It appears from the Determination that the Employer did not dispute Widiner's records. The Determination concluded that Widiner was entitled to $1,090.87 on account of wages owed (Sections 18 and 58 of the *Act*).

FACTS AND ANALYSIS

Godby disagrees with the Determination. She says, in her appeal, that it should be set aside because Widiner:

1. was an not an employee, but "volunteered" to gain skills and experience;
2. was paid for "contract work" she did;
3. settled the claim; and
4. received a "substantial wardrobe" and free alterations and repairs in appreciation of her help.

In my opinion, there is no merit to the appeal.

First, with respect to the issue of "employee" vs. "volunteer", it is clear, even from the appeal submission that this was an employment relationship (see also Section 1 of the *Act*). The appeal submission states:

> "Almost on a daily basis I kept reminding her that I could not afford to pay her. She was in the store regularly, so she knew this was true. However she kept telling me not to worry as I could pay her when I could afford it."

Moreover, in a letter to Widiner's solicitor, dated December 18 1998, suggesting a payment scheme, the appellant states:

> "Please note that there has never been, at any time, a denial that funds are owed to Ms. Widiner for services rendered."

In other words, there was an agreement to defer payment for Widiner's services and not an agreement that Widiner "volunteered" her services. This agreement is contrary to Section 17 of the *Act* (at least semi-monthly paydays) and Section 18 (payment of wages upon termination of employment). It is also clear that the agreement is contrary to Section 4 of the *Act*, which provides that an agreement to waive the minimum requirements of the *Act* or the *Regulation* is "of no effect".

Second, there is nothing in the appeal to support an argument that Widiner was an independent contractor. It must be kept in mind that the appellant Employer bears the onus to show that the Determination was wrong. A mere allegation that a person is an independent contractor is insufficient. Moreover, Widiner's claim, and the finding in the Determination, is for the hours worked as an employee of Godby and not for the "sub-contracting" work for which, as I understand the Employer's submission, she got paid separately. Assuming for the present purposes that it is appropriate to keep the two separate, the money paid for the subcontracting work cannot be offset against the wage claim.

Third, with respect to the alleged settlement, the correspondence does not bear out the claim. There was indeed an exchange of correspondence between Godby and Widiner's solicitor following the termination of the relationship. It is clear that Godby forwarded post-dated cheques to Widiner's solicitor. However, a letter from the solicitor to Godby, dated April 1, 1999, indicates that the cheques were returned because Widiner was "not prepared to accept the payment schedule which you suggested". Earlier correspondence from the solicitor suggests that she is "holding the cheques for now as I have not yet received instructions from Junele Widiner as to whether she is prepared to accept your suggestion". In short, the correspondence does not bear out the argument that the matter was settled between the parties. I reject the argument that the matter was settled.

Fourth, there is no indication of the value of the wardrobe and other benefits apparently provided to Widiner. Even if there was such value attached to those items, I would not reduce the amount owed. It is clear that wages must be paid in accordance with *Act*, *i.e.*, in Canadian currency, by cheque, draft, money order, payable on demand, drawn on a savings institution, or by direct deposit, if authorized by the employee (see Section 20). The Act does not generally allow for "payment in kind".

In the result, the appeal must fail.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination in this matter, dated June 3, 1999 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal