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-

All Seasons Spa Ltd.

("All Seasons" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	1999/336
DATE OF DECISION:	September 30th, 1999

DECISION

OVERVIEW

This is an appeal brought by All Seasons Spa Ltd. ("All Seasons" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on May 7th, 1999 under file number ER87-387 (the "Determination").

The Director's delegate determined that All Seasons owed its former employee, Judy Shaw ("Shaw"), the sum of $15,278.94 on account of unpaid minimum daily pay, vacation pay, statutory holiday pay, 3 weeks' wages as compensation for length of service and interest. Further, by way of the Determination, a $0 penalty was also assessed pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

All Seasons formerly operated a massage therapy facility in the Chateau Whistler hotel in Whistler, B.C. Ms. Shaw was one of the massage therapists who worked at All Seasons. According to All Seasons' solicitor, "All Seasons Spa Ltd. was legitimately dissolved and an entirely different and much larger...new company...was set up to offer spa related services at the Chateau Whistler...[and] the extremely modest assets of [All Seasons] were provided to the new company" (letter to the Tribunal dated July 5th, 1999).

If, in fact, All Seasons was dissolved before this appeal was even filed, I must query whether this appeal is properly before me given that, apparently, All Seasons has ceased to exist as a legal entity. In any event, given my view of the merits of this appeal, I will not rest my decision on the status of the appellant.

ISSUES TO BE DECIDED

All Seasons appeals the Determination on several grounds which may be summarized as follows:

- Shaw was not an employee but, rather, an independent contractor and, accordingly, the relationship between the parties was not governed by the *Act;*

- In the event that Ms. Shaw was employed by All Seasons, she was nonetheless not entitled to be paid compensation for length of service by reason of section 65 of the *Act* or, alternatively, because All Seasons had just cause to terminate Ms. Shaw's employment; and

- The delegate who conducted the investigation was biased and otherwise denied the employer a reasonable opportunity to respond in accordance with section 77 of the *Act.*

I shall deal with each ground in turn.

WAS SHAW AN EMPLOYEE?

Shaw worked as a "shiatsu" massage therapist with All Seasons from February 1994 to May 16th, 1997 when she was terminated.

As has been noted in a great many Tribunal decisions, the section 1 definition of "employee" (which cannot be interpreted without also considering the defined terms "employer", "wages" and "work") casts a wide net, arguably wider than that cast by the various common law "tests" that are applied by the courts to determine employee status. For the reasons set out in the Determination, I am unequivocally satisfied that there was an employment relationship between All Seasons and Shaw. Indeed, in a reference letter dated May 28th, 1997, provided to Ms. Shaw after her termination, All Seasons noted that Shaw "has been *working with our company* since September 1993" and that she was an "honoured *employee*".

The various attachments to the Determination and, in particular, the statements from former managers and the various "memos" from the managers to the therapists (including Shaw) show, in sharp relief, that All Seasons exercised a substantial measure of control over the therapists.

SECTION 65

This section provides that individual (section 63) or group (section 64--not relevant here) termination pay (or written notice in lieu of termination pay) is not payable in certain circumstances. Section 65 reads as follows:

> **65** (1) Sections 63 and 64 do not apply to an employee
>
> (a) employed under an arrangement by which
>
> (i) the employer may request the employee to come to work at any time for a temporary period, and
>
> (ii) the employee has the option of accepting or rejecting one or more of the temporary periods,
>
> (b) employed for a definite term,

(c) employed for specific work to be completed in a period of up to 12 months,

(d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act,

(e) employed at a construction site by an employer whose principal business is construction, or

(f) who has been offered and has refused reasonable alternative employment by the employer.

(2) If an employee who is employed for a definite term or specific work continues to be employed for at least 3 months after completing the definite term or specific work, the employment is

(a) deemed not to be for a definite term or specific work, and

(b) deemed to have started at the beginning of the definite term or specific work.

(3) Section 63 does not apply to

(a) a teacher employed by a board of school trustees, or

(b) an employee covered by a collective agreement who

(i) is employed in a seasonal industry in which the practice is to lay off employees every year and to call them back to work,

(ii) was notified on being hired by the employer that the employee might be laid off and called back to work, and

(iii) is laid off or terminated as a result of the normal seasonal reduction, suspension or closure of an operation.

(4) Section 64 does not apply to an employee who

(a) is offered and refuses alternative work or employment made available to the employee through a seniority system,

(b) is laid off or terminated as a result of the normal seasonal reduction, suspension or closure of an operation, or

> (c) is laid off and does not return to work within a reasonable time after being requested to do so by the employer.

Ms. Shaw was not employed for a definite term, nor for specific work to be completed within 12 months. Obviously, her employment was not at a construction site and her employment was not terminated for a reason set out in section 65(d)--All Seasons' position is that Shaw was not laid off but, rather, terminated for cause. Subsections 62(2) to (4) are irrelevant. Thus, the only conceivably relevant exception is subsection 65(1)(a) but the evidence before me suggests that Ms. Shaw's employment was not of the "casual" nature described in that subsection. Ms. Shaw's working hours were scheduled by the employer (after some consultation) and Shaw was expected to report for work in accordance with that work schedule.

JUST CAUSE

For the reasons set out in the Determination, which I adopt, I cannot agree that the employer had just cause to terminate Shaw's employment. Accordingly, All Seasons was liable to pay Shaw, based on her 3 years' completed service, 3 weeks' wages as compensation for length of service.

BIAS AND SECTION 77

The employer has not submitted *any* evidence to support either allegation. With respect to the allegation of bias, there is no evidence that the delegate was in a conflict of interest or expressed, prior to undertaking any investigation whatsoever, a clear intention to find in favour of one party or the other. In my view, a delegate cannot be presumed to be biased simply because, during the course of an investigation, a preliminary opinion, based on an assessment of the available evidence, is communicated to the party under investigation. It must be remembered that delegates, under the *Act*, have a rather unique dual role, namely, the investigation *and adjudication* of complaints. I do not accept that bias can be inferred from the mere fact that a delegate, after conducting certain investigations, expresses a preliminary view, especially when the other party is expressly requested to provide further information to show why the delegate's preliminary view is erroneous.

With respect to section 77, the record before me shows that the delegate gave the employer--through both letters and telephone communications--a more than adequate opportunity to respond to the substance of Ms. Shaw's complaint. As I noted in *Urban Native Indian Education Society* (E.S.T. Decision No. D309/99), section 77 does not create, in my view, a general disclosure obligation such as that found in the B.C. Supreme Court Rules. Thus, even if the delegate did not provide to the employer, during the course of her investigation, every single document that was contained in her file, the section 77 obligation was discharged if the general thrust of the complaint--and the supporting evidence--was made known to All Seasons. My review of the file

shows that the delegate clearly advised the employer about the nature of the complaint and the corroborating evidence she had in hand.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$15,278.94** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Given that the employer's various breaches of specified provisions of the *Act* have now been confirmed, it follows that the $0 penalty is also confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal