

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 -

Edgelow Business Agencies Ltd.
(“Edgelow”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Hans Suhr

FILE NO.: 97/616

DATE OF DECISION: September 17, 1997

DECISION

OVERVIEW

This is an appeal by Edgelow Business Agencies Ltd. (“Edgelow”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated July 23, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Edgelow alleges that the delegate of the Director erred in the Determination by concluding that Douglas MacDonald (“MacDonald”) was an employee entitled to annual vacation pay and compensation for length of service. The Director’s delegate concluded that MacDonald was entitled to annual vacation pay and compensation for length of service in the amount of \$999.23 plus interest for a total of \$1,023.03.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Was MacDonald an employee of Edgelow ?
2. Does Edgelow owe annual vacation pay and compensation for length of service to MacDonald ?

FACTS

MacDonald possessed a Security Employee Licence issued by the Province of British Columbia which indicated that he was a “Private Investigator - (Under Supervision)”.

MacDonald was provided with a ‘Security Employee Identification Card’ which identified him as being employed by Edgelow and is signed by the manager of Edgelow on July 16, 1996.

MacDonald was provided with business cards which identified him as a private investigator for Edgelow.

Revenue Canada conducted a review of MacDonald’s status and ruled that he was an employee of Edgelow.

Revenue Canada conducted an audit of Edgelow’s records and determined that MacDonald had earned a total of \$16,043.26 during his period of employment with Edgelow.

The delegate of the Director states in the Determination that while Edgelow initially claimed that MacDonald was not an employee, however, prior to the Determination being issued, Edgelow conceded that MacDonald was an employee.

I note that Edgelow sent a letter dated July 14, 1997 to the delegate in regard to MacDonald which stated "Further to our telephone conversation the following is the statement regarding the above's (sic) final payment for his income as per the termination of **his employment..**" (emphasis added)

ANALYSIS

There is no evidence of Edgelow disputing MacDonald's status as an employee subsequent to their July 14, 1997 letter and prior to the Determination being issued, until they submitted the appeal of the Determination to the Tribunal.

While the delegate of the Director did not make a decision in the Determination with regard to MacDonald's status as an employee because the delegate concluded that status was no longer an issue with Edgelow, I am prepared to consider the status issue as part of the appeal before me.

A review of the evidence provided indicates that:

- Edgelow provided identification and business cards which stated that MacDonald was an employee;
- Edgelow has not provided any evidence of a contract with MacDonald which purports him to be an independent contractor;
- MacDonald was required to provide personal services for Edgelow;
- the clients were clients of Edgelow not MacDonald;
- Edgelow provided MacDonald with advances on commissions and advances on future commissions.

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;*

Edgelow has not provided any evidence to substantiate their allegation that the delegate of the Director erred in the Determination by concluding that MacDonald was an employee.

I conclude on the balance of probabilities that MacDonald was an employee of Edgelow.

The audit by Revenue Canada clearly indicates that no annual vacation pay was paid to MacDonald. There was no evidence provided by Edgelow that MacDonald's employment had been terminated for just cause or that Edgelow had provided written notice of termination.

I conclude on the balance of probabilities that Edgelow owes annual vacation and compensation for length of service to MacDonald in an amount as calculated by the delegate of the Director and set forth in the Determination.

For all of the above reasons, the appeal by Edgelow is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated July 23, 1997 be confirmed in the amount of \$1,023.03.

Hans Suhr
Adjudicator
Employment Standards Tribunal