

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-

West Vancouver Notes & Crafts Society

(“West Van Notes”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/380

DATE OF HEARING: September 2nd, 1997

DATE OF DECISION: October 6th, 1997

DECISION

APPEARANCES

William Dey (a.k.a. Dei), Exec. Director
and Alan Pierce, President

for West Vancouver Notes & Crafts Society

No appearance

on behalf of the Director of Employment Standards

OVERVIEW AND ISSUE TO BE DECIDED

This is an appeal filed by William Dey on behalf of West Vancouver Notes & Crafts Society (“West Van Notes” or the “society”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on April 24th, 1997 under file number 77950 (the “Determination”).

By way of the Determination, the Director levied a \$500 penalty against West Van Notes for its failure to keep and maintain payroll records as mandated by section 28 of the *Act*. West Van Notes has appealed this penalty on the ground that the complainants were volunteers, not employees, and therefore, West Van Notes was not required to maintain any payroll records with respect to the two individuals in question. West Van Notes does not dispute the Director’s finding of fact that it did not keep payroll records with respect to the two complainant employees or with respect to any “volunteers”, rather, it says that it had no legal obligation to do so.

The appeal was heard in Vancouver on September 2nd, 1997 at which time I heard evidence and submissions from William Dey, Alan Pierce, Bill Oin and Tim Schermerhorn on behalf of West Van Notes. Messrs. Dey and Pierce hold senior executive positions with the appellant; Mr. Oin is a board member and volunteer with the society; Mr. Schermerhorn is not currently a board member but still does volunteer work with the society. Curiously, given the nature of the appeal, the Director did not appear at the hearing.

FACTS

West Van Notes is a registered society under the B.C. *Society Act* (registration no. S-31511) and as such is operates as a charitable organization with a particular interest in serving the needs of physically disabled persons. West Van Notes purchases crafts and other marketable items from various lower mainland “workshops” and in turn resells these products from booths or tables set up in a number of retail shopping malls. The mall operators allow West Van Notes (and other charitable organizations) to use their malls at no cost.

In the case of West Van Notes, the “sales tables” are “staffed” by a number of wheel-chair bound individuals who apparently volunteer their time--their incidental travel or other expenses are reimbursed by the society.

According to information provided by the Director’s delegate in a letter to the Tribunal dated May 26th, 1997, two individuals--James Bradley and Rick Magnussen--filed complaints alleging that they had not been paid for work they did for West Van Notes. Although payroll records relating to these two individuals were requested, no such records were provided and, as noted above, it is common ground that no such records exist. The society’s position is, simply, neither Messrs. Bradley or Magnussen, or anyone else who might staff one of the society’s sales tables in a shopping mall, were ever society employees. Rather, the society maintains that they were volunteers and thus, the section 28 obligation regarding the keeping of payroll records does not apply.

ANALYSIS

Section 28 of the Act directs an employer to keep certain payroll records “for each employee”. In the event that such payroll records are not kept by an employer, under section 28 of the *Employment Standards Regulation* the Director may levy a \$500 penalty. Thus, it must be determined if the two complainants, or any other “volunteer”, were “employees” as defined by the *Act*.

An “employee” is defined in section 1 of the *Act*, *inter alia*, as “a person an employer allows, directly or indirectly, to perform work normally performed by an employee”. In that same section an “employer” is defined as including “a person...who has or had control or direction of an employee”. Finally, “work” is defined as “labour or services an employee performs for an employer whether in the employer’s residence or elsewhere”.

Applying the above interrelated definitions to the circumstances of the two complainants and their relationship to the society, I am satisfied that both complainants were “employees” under the *Act* and, therefore, West Van Notes was obliged to maintain certain payroll records as mandated by section 28 of the *Act*. It follows that this failure was properly penalized under section 28 of the *Employment Standards Regulation* by way a determination in the amount of \$500.

At the hearing, West Van Notes tendered a number of signed statements from some of its volunteers in which these individuals purport to acknowledge and confirm that they do not expect to be paid any wages for their services on behalf of the society except for reimbursement of travel and other ancillary expenses. Tellingly, no such form has been produced into evidence under the signature of the two complainants and the very fact that they filed a complaint under the *Act* suggests that they did not consider themselves, at least when they filed their complaints, to be “volunteers”.

Thus, the situation before me appears to be that the two complainants sold various crafts, on behalf of the society, from tables located in malls throughout the lower mainland; these crafts were resold at a profit which profits were in turn were used by the society for its own purposes. I see nothing

in the foregoing scenario that differentiates the two complainants from any other sales clerk employed anywhere in B.C.

I do not wish my comments to be taken as suggesting that someone can never be a “volunteer” and that so long as a person renders services in the nature of “work” to an employer he or she must be presumed to be an “employee” under the *Act*.

However, in the present instance the complainants clearly believed themselves to be hired as employees, they both appear to meet the statutory definition of “employee”, and the employer has simply failed to present any evidence to suggest that the two complainants were volunteering their time to the society with no expectation of reward. In cases such as this, the burden of proof lies on the employer to show, on a balance of probabilities, that the complainant’s services were not rendered in the context of an employment relationship. The employer in the instant appeal has simply failed to meet that burden.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated April 24th, 1997 and filed under File No. 77950, be confirmed in the amount of \$500.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal