

**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 -

Dynamic Floors Inc.  
("Dynamic Floors")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Cindy J. Lombard

**FILE NO.:** 1999/531

**DATE OF HEARING:** November 15, 1999

**DATE OF DECISION:** December 02, 1999

## DECISION

### APPEARANCES

The Appellant-employer, Dynamic Floors Inc. (“Dynamic Floors”), was represented by its owners, Carmin and Paul Tsamkiranis (“C. Tsamkiranis” and “P. Tsamkiranis”). Also appearing as a witness for Dynamic Floors was Ron Cavers.

The Respondent-employee, Michelle Hattie (“Hattie”) appeared on her own behalf.

The Director was represented by Joe LeBlanc.

All parties were notified that the hearing was to commence at 9:00 a.m. on November 15<sup>th</sup>, 1999. When the Appellant did not appear by 9:25 a.m., the hearing was commenced in their absence and initially concluded at 10:00 a.m. Just as Mr. LeBlanc, Hattie, and the Adjudicator were leaving, the Appellant appeared stating that they believed that the hearing was to commence at 10:00 a.m. The hearing was, therefore, recommenced at 10:00 a.m. and concluded at 11:30 a.m. after hearing from all parties and their witness.

### OVERVIEW

This is an appeal by the employer, Dynamic Floors, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination of the Director of Employment Standards (the “Director”) issued on August 9, 1999.

Hattie worked for Dynamic Floors commencing in April, 1997. Hattie’s duties included bookkeeping, sales, answering the telephone, etc. The date of termination of Hattie’s duties is in issue. Hattie says that it was July 29, 1998, while her employer, Dynamic Floors, says that it was prior to that date.

Hattie was paid \$2,000.00 per month without any source deductions.

On August 4, 1998, Hattie filed a complaint with the Employment Standards Branch claiming the following:

1. Regular wages from July 16 to July 31, 1998
2. Vacation pay
3. Termination pay

After investigating the complaint, the Director issued a Determination on August 9, 1999, making the following findings and Orders:

1. Hattie was an employee and not a sub-contractor while working for the employer and therefore was entitled to coverage by the *Act*.

2. The employer owed Hattie regular wages for the period July 16 to July 29, 1998, in the amount of \$1,000.00.
3. The employer owed Hattie statutory vacation pay in the amount of \$1,212.00 (4% of gross annual earnings of \$30,300.00).
4. Furthermore, interest was due in the amount of \$115.17.
5. By oversight, Mr. LeBlanc gave evidence that no Determination was made on the issue of whether compensation in lieu of notice was due to Hattie by the employer.

### **ISSUES TO BE DECIDED**

The issues raised on appeal in response to the Determination are as follows:

1. Was Hattie an employee or sub-contractor?
2. Was the Director correct in his finding that the employer owes Hattie wages for the period July 15 to July 29, 1998?
3. Was Hattie owed compensation for length of service in lieu of notice?
4. Did the Director err in not dealing with the issue whether Hattie owed monies for materials such as hardwood, glue, carpet and under-pad that the employer alleges that Hattie took from the store but never paid for?
5. Was the Director correct in his Determination that statutory vacation pay is owed by the employer to Hattie?

### **FACTS**

#### **1. Was Hattie an employee or sub-contractor?**

Hattie says that when she began her employment for Dynamic Floors she asked to be paid as a sub-contractor and that the Tsamkiranis' agreed. Hattie was paid \$2,000.00 gross per month without source deductions, for example, Revenue Canada, EI, etc. The test in law as to whether relationship is that of contractor/sub-contractor or employer/employee is fourfold:

- i) Does the employer have control or direction of the employee;
- ii) Who owns the tools of trade?
- iii) Who has the chance of profit?
- iv) Who has the risk of loss?

If the employer has control or direction of the employee, owns the tools used and alone has the chance of profit and loss, then the relationship is that of an employer/employee. In this case:

- a) Dynamic Floors had the control and direction of Hattie. Hattie worked full-time for Dynamic Floors, generally 9:00 a.m. to 5:00 p.m. on their premises each day;
- b) P. Tsamkiranis, on behalf of Dynamic Floors, stated that the employer owned all the office equipment used by Hattie to carry out her employment duties;
- c) Only Dynamic Floors had the chance of profit or the risk of loss. Hattie was paid a straight salary.

Clearly the Director was correct on the evidence finding that the relationship between Dynamic Floors and Hattie was that of employer/employee and therefore she had the full protection of the *Act*.

**2. Was the Director correct in his finding that the employer owes Hattie wages for the period July 15 to July 29, 1998?**

Hattie's evidence is that on July 29, 1998, P. Tsamkiranis met with her and for the first time told her that he didn't think that she was handling customers as well as she used to and that she had not passed on telephone messages and as a consequence the employer had lost jobs and therefore income. Hattie says P. Tsamkiranis asked her to hand her keys in and leave.

The last cheque received by Hattie from Dynamic Floors was dated July 15, 1998, and in the usual amount given to her bi-monthly of \$1,000.00.

P. Tsamkiranis says that somewhere around June 30, 1998, he brought to Hattie's attention alleged complaints about her being rude to customers. He says that he felt that the rudeness was due to the fact that Hattie's daughter was not well following a motor vehicle accident. P. Tsamkiranis says that he recommended to Hattie that she take time off and return when she was feeling better. P. Tsamkiranis says that Hattie never returned and therefore she was paid only to July 15, 1998.

I do not find P. Tsamkiranis' evidence credible. He was inconsistent in his version of events. For example, in his letter addressed to the Employment Standards Tribunal, P. Tsamkiranis did not state that he told Hattie to take some time off but rather that he asked her to work the Fernie area as a sales person on a commission basis but that she refused to do so and quit.

I accept Hattie's evidence that she worked until July 29, 1998, and therefore that the Director's Determination that she is owed wages for the period July 15 to July 29, 1998, is correct.

**3. Was Hattie owed compensation for length of service in lieu of notice?**

As stated by Joe LeBlanc, on behalf of the Director, he failed to deal with this question in his Determination and this issue should therefore be remitted back to the Director.

**4. Did the Director err in not dealing with the issue whether Hattie owed monies for materials such as hardwood, glue, carpet and under-pad which the employer alleges that Hattie took from the store but never paid for?**

The Director was correct in not dealing with this issue as it is not a matter that falls within the purview of the *Act*.

**5. Was the Director correct in his Determination that statutory vacation pay is owed by the employer to Hattie?**

P. Tsamkiranis, on behalf of Dynamic Floors, says that the cheque issued to Hattie dated July 15, 1998, in the amount of \$1,000.00 was vacation pay. The cheque contains no notation that it is vacation pay. Furthermore \$1,000.00 was Hattie's usual wages for that period. The actual vacation pay owed was an odd amount, namely, \$1,212.00.

Hattie says that she worked the period July 1 to July 15, 1998, and I accept that evidence. Therefore, the Director was correct in his Determination that statutory vacation pay is outstanding to Hattie.

**SUMMARY**

The onus is on the employer to show that the Director's Determination is incorrect. The employer has not satisfied that onus.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination with respect to Hattie be confirmed as issued in the amount of \$2,363.17, together with whatever further interest that may have accrued pursuant to Section 88 of the *Act* since the date of its issue.

I further Order that the outstanding issue on which the Director did not make a Determination, namely, whether Hattie is owed compensation in lieu of notice by the employer, be remitted back to the Director for further investigation.

**Cindy J. Lombard**  
**Adjudicator**  
**Employment Standards Tribunal**