

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-

William Christopher Dale

(“Dale”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/606

DATE OF DECISION: November 23, 1998

DECISION

OVERVIEW

This is an appeal brought by William Christopher Dale (“Dale”) 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 August 26th, 1998 under file number 084-581 (the “Determination”).

The Director’s delegate determined that East Side Family Place Society (“East Side” or the “employer”) owed Dale \$2,300.03 on account of unpaid wages due to him by reason of section 34(2)(a)--the 4-hour minimum daily pay provision--of the *Act*.

The delegate found that as and from February 1st, 1997 until his employment ended on November 12th, 1997, Dale was an East Side employee and entitled to be paid on the basis of 4 hours per shift even though he may have actually worked some lesser number of hours each shift. However, Dale’s claim for unpaid wages prior to February 1st, 1997 was rejected because Dale was a “contractor” during that period. There are no reasons set out in the Determination as to why the delegate was of the view that Dale was a “contractor”, rather than an employee as defined in section 1 of the *Act*, prior to February 1st, 1997. The only reference in the Determination to this latter point is a statement that prior to February 1st, 1997 the evidence regarding Dale’s status was “equivocal”.

FACTS

The following matters were set out in the Determination:

- “East Side supplied records which show Dale to have worked regularly, 2 hours per day.”
- “There were changes in the Directorship of East Side during Dale’s employment and this resulted in changes to how his employment relationship was viewed.”
- “Dale worked 3 days a week, starting, he believes, in early 1995; Sunday, Tuesday and Thursday for 2 hours each day.”
- His starting rate of pay in 1995 was \$10/hr. which was raised to \$10.25/hr. in April 1997.”
- “Dale terminated his employment November 12, 1997.”

ISSUE TO BE DECIDED

Dale submits that he was an “employee” during the entire course of his relationship with East Side, not just from February 1st, 1997. In a written submission to the Tribunal dated October 22nd, 1998, the employer simply asserts: “[East Side] will state once again that the Society did and does believe that [Dale] had a contractual agreement with the Society during his years with the Society”. The employer, in this letter does not assert that Dale’s status was that of an *independent contractor* but I presume that is the intended thrust of their submission. It should noted, of course, that *all* employees have a “contractual agreement” with their employers; the issue here is whether Dale worked under a contract of employment or under an independent service contract.

ANALYSIS

The terms “employee” and “employer” are defined in section 1(1) of the *Act* as follows:

“employee” includes

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- (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;

“employer” includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee;

In my view, there are several aspects of Dale’s relationship with East Side that suggest his relationship with East Side, based on the foregoing definitions, was an employment relationship, namely:

- Although Dale invoiced East Side for his services, he was paid always paid by way of a payroll cheque;
- East Side issued Dale a T-4 record of earnings each year, including the years prior to 1997. Dale’s 1995 and 1996 T-4 statements were included in his supporting materials

filed with the Tribunal--his total earnings for each year are recorded as "employment income" and East Side designated itself as Dale's "Employer";

- There is nothing in the material before me to suggest that the nature of Dale's duties, or his relationship with East Side, changed in any significant way as of February 1st, 1997--thus, if he was an employee after February 1st, why not before?;

- Prior to February 1st, 1997, the employer advised Dale that his \$10 hourly wage included "vacation pay"--independent contractors are not entitled to vacation pay, only employees;

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- The delegate issued a "Demand for Employer Records" relating to Dale and spanning the period June 1995 to July 1997; Dale was identified as an "employee" and East Side produced, without objection, the relevant records, never once claiming that Dale was not an employee, at least prior to February 1st, 1997;

- Prior to February 1st, 1997 Dale was recorded in East Side's computerized payroll system as an employee (see December 31st, 1996 and 1996 "Employee Information Reports"--the information contained in these reports included Dale's Social Insurance Number and birth date--information that the employer had no need of if, in fact, Dale was only an independent contractor). Dale was referred to in the reports as an hourly employee who was paid bi-weekly. Finally, in these same Reports, Dale's "hire date" was noted as well as the date of his "last increase".

Based on the foregoing evidence, I must conclude that the delegate erred in determining that Dale was an "independent contractor" prior to February 1st, 1997; in my view, the overwhelming weight of the evidence supports Dale's contention that he was an East Side employee throughout the entire course of his tenure with that firm.

ORDER

Pursuant to section 115 of the *Act*, I order that this matter be referred back to the Director so that Dale's wage entitlement, including accrued interest, can be recalculated in accordance with the findings contained herein and the relevant provisions of the *Act*.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal