

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 -

Colleen Gunther
operating European Day Spa
(the “Spa” or the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/599

DATE OF HEARING: November 16, 1998

DATE OF DECISION: November 23, 1998

DECISION

APPEARANCES/SUBMISSIONS

Ms. Colleen Gunther (“Gunther”) on behalf of the Employer
Ms. Merrin McLachlan (“McLachlan”) on behalf of herself

OVERVIEW

This is an appeal by the Employer 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 21, 1998 which determined that Gunther was liable for vacation pay to McLachlan. The Director’s delegate found that McLachlan was an employee, and not an independent contractor, and that she was owed \$853.92.

FACTS AND ANALYSIS

Gunther operates European Day Spa in Abbotsford. McLachlan worked as an esthetician at the Spa between May 6, 1996 and November 19, 1997. The Employer says she is an independent contractor.

The delegate appears to have applied the traditional common law tests in reaching his conclusion. While I do not necessarily agree with his reasons, for the reasons set out below, I agree with his conclusion, *i.e.*, that McLachlan was an employee for the purposes of the *Act* and, as such, entitled to vacation pay. The amount of vacation pay is not in dispute.

The “independent contractor’s agreement” between McLachlan and Gunther sets out the basic parameters of the relationship between the parties. McLachlan “shall pursue her/his business ... exclusively under this agreement”. The Spa provides “management, administrative support, supplies, working space, advertising, and other support services” for hairdressers and aestheticians. This includes furniture, utilities, telephone, reception, products used to provide services, and equipment. Gunther collects payment for services provided and pays the hairdressers and aestheticians every two weeks. I understood from the testimony at the hearing that Gunther used to pay 50% to McLachlan and--at some point in time--reduced this to 45%. McLachlan was paid on a commission basis. The policy manual, which hairdressers and aestheticians are expected to follow, provides guidance in dealings with customers, holidays (three weeks per year after one year on staff) and other matters.

I understand from the testimony at the hearing that customers telephone the Spa to book appointments. Gunther says that the customers “often ask for a specific worker” or “one may be assigned by the reception”. McLachlan says that her hours of work and the services she performed were assigned by the receptionist. Gunther explains “if we didn’t do that, there would be no work”. Gunther also explains that McLachlan could not substitute another person for herself as she (Gunther) “wouldn’t know their credentials” and, moreover, “it wouldn’t be feasible”.

In order to determine whether a person is an employee or an independent contractor, it is useful to consider the “four-in-one test”: (1) control, (2) ownership of tools, (3) chance of profit and (4) risk of loss with an emphasis on the combined force of the whole scheme of operations. In many cases the question can only be settled after examining the whole of the relationship between the parties. It is in some cases possible to decide the issue by raising the question “whose business is it ... whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior” (*Montreal v. Montreal Locomotive Works Ltd.* <1947> 1 D.L.R. 161, at 169-70 (H.L.) quoted in *Wiebe Door Services Ltd. V. Minister of National Revenue*, 87 D.T.C. 5025 (Fed.C.A.), per MacGuigan J.A.). I also accept that in determining whether a person is an employee the remedial nature of the *Act* and the purposes of the *Act* are proper considerations as well as the statutory definitions of “employee and “employer”.

Looking at the whole of the relationship between the parties, in light of the above tests, I am of the view that McLachlan was an employee (Section 1 “Employee”). Essentially what she supplied to the business was her skills, labour and some tools. Gunther supplied furniture, utilities, telephone, reception, products used to provide services, and equipment. While McLachlan and other aestheticians may have their own customers, and have some flexibility and freedom with respect to how they do their work done and their hours of work, customers are also assigned by the Spa. Gunther’s own evidence confirms the importance of this: “if we didn’t do that, there would be no work”. Moreover, the customers pay Gunther and not McLachlan. She was paid by Gunther by commission. There was evidence that the commission rate was set by Gunther (though she states that it was done in cooperation with the hairdressers and aestheticians). Under the policy manual, referred to above, Gunther regulates the conduct of hairdressers and estheticians who work at the Spa. This policy even regulated vacation entitlement. One of the hallmarks of an independent contractor is the ability to substitute his or her services or labour with that of another. Gunther acknowledged that McLachlan could not substitute another person for herself as she (Gunther) “wouldn’t know their credentials” and “it wouldn’t be feasible”.

In my view, the evidence overwhelmingly pointed to the business being Gunther’s and an employer-employee relationship between her and McLachlan. In the result, I am not prepared to disturb the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated August 21, 1998 be confirmed together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal