

BC EST # D540/98

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 -

Boys and Girls Club of Ladysmith
("Club or employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 98/527

DATE OF HEARING: November 23, 1998

DATE OF DECISION: December 10, 1998

DECISION

OVERVIEW

This is an appeal by the Boys and Girls Club of Ladysmith (the “Club”) of a Determination dated July 17, 1998. The issue is whether Joan Townsend was an employee of the club and whether she was entitled to a bonus of \$222.89. Mrs. Townsend was also dissatisfied with the Determination made, and believes that she is entitled to more wages than the Director’s delegate determined as her entitlement. She, however, did not file an appeal of the Determination. The only matter before me is the employer’s appeal which relates to the payment of the bonus.

ISSUES TO BE DECIDED

1. Was Joan Townsend an employee of the Club?
2. Was she entitled to a bonus of \$222.89?

FACTS

Mrs. Townsend commenced providing bookkeeping services to the Club in February of 1994. She commenced doing the books for \$100.00 per month. Through a process of tracking her hours, at the request of the board, the amount was increased to \$200.00 per month. The programs of the Club were expanded in the fall of 1996, thus creating more work for Mrs. Townsend. Mrs. Townsend’s relationship with the Club came to an end on February 28, 1997. On February 20, 1997 she presented a demand or proposal for increased payment based on an hourly rate of pay. She felt that the Board was not dealing with her request in a timely manner. She resigned from her position.

At the time when Mrs. Townsend ceased working for the Club she was working from her home, using her own computer, and computer software. She was using forms that she had designed herself, to present information to the Club. She set her own hours of work, and did not provide time sheets to the Club. The Club was paying her a monthly stipend for the work that she performed in the amount of \$200.00 per month. The Club did not make any statutory deductions from her pay. She was not supervised by the Executive Director, J. Dean McCuaig.

Mrs. Townsend indicated that she believed she was an employee, as did two persons, Cindy Desrochers (Past President) and Joyce Brennan (Past Treasurer) who were involved with the Club at an earlier time. She says that she started working at her home because there was not sufficient office space at the Club. She says that she did respond to some direction from the Club. She says

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that given the amount of money she earned the club was not required to make deductions from her pay. She indicated that the issuance of a Revenue Canada T4 slip rather than a T4A slip was evidence that she was an employee. I was told that a T4 slip was a document which was filed with Revenue Canada for an employee and the T4A slip was a document filed with Revenue Canada for a contractor. She indicates that the accountant would not have approved the issuance of T4 slips if in fact she was an independent contractor. The accountant did not testify in this proceeding. I accept the Club's argument that the accountant was relying on the material prepared by Mrs. Townsend, and therefore the issuance of T4's is not satisfactory proof that she was an employee.

The evidence presented by the Club indicated that Ms. Townsend, was paid a Christmas bonus of \$50.00 as were all the employees of the Club. Mrs. Townsend agreed that she received a Christmas bonus. There was no evidence of an agreement that the Club paid anyone a bonus for extra work during the years 1996 or 1997. The parties were agreed that the Delegate erred when he said that:

The investigation revealed that the employer did provide the bonus for other employees but alleged that the complainant was not an employee and therefore not eligible for this bonus.

In or about January of 1995, Mrs. Townsend received a "bonus" for extra work performed in completing the 1994 year end. The books of account were apparently in a poor state when she took up the position as bookkeeper and she had to perform the 1993 year end and organize the books of account.

Mrs. Townsend said that when she was doing the 1996 books, in 1997, she discovered that she had not been paid money that she was entitled to receive in early 1996 for doing the 1995 tax year. This does not appear to have been raised with the Club prior to resignation.

After her resignation, Mrs. Townsend contacted a number of persons outside the Ladysmith based club including the United Way, Local Member of the Legislative Assembly, the main office of the Boys and Girls Club of Canada and Revenue Canada about matters unrelated to her employment. It is clear to me that she has some sort of axe to grind with regards to the Club. I do not accept her evidence that there was any agreement with regard to "payments for extra work" beyond the one time payment issued in 1995 with regard to the problems created by the manner in which the books were kept in 1993.

ANALYSIS

The burden is on the employer in this case to show that there was an error in the Determination such that I should vary or cancel the Determination.

Issue 1: Employee or Independent Contractor

There is no analysis set out in the Determination which considers this issue. The Delegate appears to have proceeded from the assumption that Mrs. Townsend was an employee. The employer raised this issue at the outset of the investigation. The manner in which it was dealt with in the Determination is as follows:

Enquiry into the employers allegations brought forward the former president and secretary treasurer with the attached statements Exhibit "A" and Exhibit "B". Obviously the complainant was an employee, and is therefore entitled to this bonus given on the basis of work completed at year end.

I am satisfied from a review of the evidence, that Ms. Townsend was an independent contractor and not an employee of the Club. I find this to be so, because she worked at home, providing bookkeeping services to the Club, using her own computer hardware and software and report forms that she designed. She provided the bulk of her own stationary needs. The employer did not make statutory deductions. She set her own hours of work. She was not supervised. She was not required to account for her time. She was free to work for others. I am advised by Mr. McCuaig that despite the T4 slips and a declaration of conditions of employment, Revenue Canada has treated Mrs. Townsend as a contractor.

It is clear that determination by Revenue Canada of a worker's status may be a factor considered by me, but that determination is not binding on me: *Profile Marble & Bath Ltd*, BC EST #D055/97 (Pawluk); *R.J. Heatsavers Glass & Sunrooms Inc*, BC EST #D137/97 (Thornicroft).

It is clear from an analysis of the Tribunal's decisions on this point, that the determination of a person as an employee is a matter of characterization based on a consideration of the facts and the applicable law. The Tribunal will consider control or direction of the worker, ownership of tools, chance for profit and loss, and organization or integration of the worker with the employer's operation: *Bandyman Computer Service Inc.*, BC EST#D016/97 (Longpre); *Aubin*, BC EST #D105/97 (Longpre).

In my view the substance of the relationship is that of independent contractor because Mrs. Townsend supplied her own tools, she set her own hours or work in her own home, and was not subject to the supervision or direction of the Club. She had a service to provide - that of bookkeeper. The Club did not have the need for a full time bookkeeper and the business arrangement was one that suited both parties. The Club got the services it required and Mrs. Townsend was free to do the work when it was convenient to her. Bookkeeping is a service that is often provided by independent contractors, especially where an entity such as the Club, has a limited need for bookkeeping services. Mrs. Townsend was free to do other work for other customers, although it is clear that the outside work she did was minimal.

I did review letters from Cindy Desrochers (Past President) and Joyce Brennan (Past Treasurer) on which the Director's delegate relied in coming to a Determination that Ms. Townsend was an

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employee. Mr. McCuaig indicated that both these persons had “an axe to grind” with the Club, and that I should take that into account when evaluating this evidence. Neither of these persons appeared before me. There is some support for Mr. McCuaig’s evidence in the documentary evidence filed with the Tribunal. The Club wrote a “cease and desist” letter to Ms. Desrochers.

I do not find the documents filed with Revenue Canada - particularly T4 slips and Declaration of Conditions of Employment, persuasive evidence that Mrs. Townsend was an employee. These are documents which she prepared or were prepared on the basis of information given by her. They are therefore some evidence of her belief that she was an employee.

In conclusion I am satisfied that Mrs. Townsend was not an employee.

Issue #2: Entitlement to a Bonus

While I have come to the conclusion that Mrs. Townsend was not an employee, it is also clear that whether she was an employee or not, the Delegate erred with regard to the finding of entitlement to a bonus.

Mr. McCuaig testified that he was not questioned by the Director’s delegate concerning any bonus arrangements. His evidence, which I accept, was that Mrs. Townsend was paid a Christmas bonus of \$50.00 at the end of 1996.

Mrs. Townsend argued that she was entitled to the sum because she had been paid an increased amount in the year that she took over the books. She said that there was increased work during the 1997 year because of the expanded club activities. She claimed that the monies were owing for non-payment of bonuses in earlier years.

I accept that the Club’s expansion posed additional work for Mrs. Townsend. I also accept the evidence of the Club that it likely would have increased Mrs. Townsend’s remuneration, but that it has a volunteer board, and it takes time to deal with these issues. Mrs. Townsend quit before these issues were dealt with. It is not up to this Tribunal to interfere in the contractual relations between the parties. This Tribunal deals with appeals from Determinations which relate to violations or alleged violations of the *Act*. I am not satisfied that the evidence before me demonstrates any fixed pattern of giving bonuses for extra work performed, and that the bonus given in 1996 was an extraordinary event and linked to Mrs. Townsend taking over the bookkeeping function.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated July 17, 1998 be cancelled.

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**Paul E. Love
Adjudicator
Employment Standards Tribunal**