

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 -

Constance Lamers
("Lamers")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: James Wolfgang

FILE NO.: 97/600

DATE OF HEARING: November 24, 1997

DATE OF DECISION: January 22, 1998

DECISION

APPEARANCES

Constance Lamers	On her own behalf
Dr. Richard Garry Graves	On his own behalf
Gary R. Jackson	Counsel for Graves

OVERVIEW

This is an appeal by Constance Lamers (“Lamers”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards on July 18, 1997.

The Determination found Lamers was not an employee for the purposes of the *Employment Standards Act* and was not entitled to payment of annual vacation and statutory holiday pay or compensation for length of service.

Lamers filed as appeal dated August 5, 1997 against the Director’s Determination.

A hearing was held on November 24, 1997. Prior to the hearing, counsel for Dr. Richard Graves (“Graves”) questioned whether the Tribunal had Jurisdiction to hear the case as Graves is a member of the College of Dental Surgeons and exempt under Section 31(e) of the *Employment Standards Regulations* (“Regulations”).

Section 31(e) of the *Employment Standards Regulations* states:

The Act does not apply to an employee who is

(e) a member of the College of Dental Surgeons under the Dentists Act.

I advised that I would hear the evidence in the case and decide on the preliminary matter later.

Upon considering the evidence I find that Graves is the employer in this case. The *Regulations* only present a bar if the party is an employee, therefore the complainant, Lamers is a member of the College of Dental Hygienists of British Columbia which is not excluded by Section 31 of the *Regulations*.

A further objection was raised by Graves. He had requested an adjournment until such time as the investigating officer could attend the hearing. Graves’ application for an

adjournment was filed on Friday November 21, 1997 for the hearing scheduled on Monday November 24, 1997. It was denied by the Tribunal.

The attendance of the officer may have assisted the parties and myself, however, there is no requirement under the *Act* for them or her to appear. In many cases, an explanation of the reasons for their decisions, would be beneficial to the process.

ISSUES TO BE DECIDED

Is Lamers an employee within the meaning of the Act and, if so, is she entitled to annual vacation pay, statutory holiday pay and compensation for length of service?

FACTS AND ARGUMENT

Lamers worked as a dental hygienist at Graves' office from September 15, 1994 to May 23, 1996. She was the first hygienist employed by him. Prior to that time he had performed this work himself.

Both parties agree Lamers entered into a contract with Graves to provide dental hygienist service at his office. This agreement was not in writing and provided she would be paid on a percentage of her gross billings.

Graves argues Lamers was an independent contractor who was responsible in every way for her own work and for her own financial deductions and reconciliations. Further she had worked under similar contractual arrangement at previous dental offices. He presented a letter from Dr. Chilibeck which confirmed Lamers had worked there as an independent contractor, however, she worked for more than one dental office, scheduled her time off and provided her own relief.

Lamers was working two days per week plus two Saturdays per month. To qualify as a independent contractor for income tax purposes her accountant advised her she must work at more than one dental office. When she told Graves of her intention of working for other offices he objected but did increase her hours.

Graves claims Lamers was at liberty to provide her services to other dental offices and he was not aware whether or not she was actively involved in searching for other business.

Lamers states it was important to her to have flexibility in being able to select her hours and days of work. She denies she was able to change her hours or time off without permission. She preferred to work a 4-day work week with extended hours. Graves required her to work the same hours as the rest of the office.

Lamers states that when the office hours were changed for the Summer schedule she was required to comply with that schedule. Further, when the anesthetist attended the office for an early appointment her hours would be changed even when she was not involved in the procedure.

Graves argues Lamers was at liberty to tailor her working hours and did so, changing her hours of work and time out of the office. She often began an hour before and finished 4 hours earlier than the other staff. Further, she would frequently leave the office if a patient cancelled or if no patients were scheduled for a given day. During the month of July 1995 Lamers was “out of the office”. This was done without his permission.

All bookings for Lamers were done through the receptionist and were limited to seven per day. Lamers claimed she tried to increase the number of patients scheduled without success. The office was closed during lunch period so she was unable to book extra patients for that time.

Graves was concerned the quality of service would suffer if additional patients were booked indicating “ I wouldn’t want to be the 8th patient of the day”.

Lamers claims she continued to request more time off so Graves finally agreed to hire a second hygienist for 2 Fridays per month. Graves interviewed and hired the applicant. She was not involved in the hiring process.

Lamers was not achieving the flexibility expected so she requested to be put on salary. Graves refused stating it would cost too much.

In March or April of 1996 the College of Dental Surgeons issued an information booklet advising dentists their commission employees were entitled to statutory holiday pay and vacation pay. Lamers approached Graves at that time requesting these benefits retroactive to her time of hire. Graves refused but offered to make the change to provide these benefits currently with no retroactive application. When she continued to press for retroactively she alleges Graves lost his temper, became abusive and threatened to dismiss her.

On May 16, 1996 Lamers advised Graves she was not comfortable with their employment situation, and it put her status in jeopardy with Revenue Canada. She wanted to be an employee and receive benefits when she felt entitled to from the information given in the booklet. If those terms were not acceptable she was prepared to offer three months notice of termination. Graves rejected her notice stating it would not come to that.

On May 20, 1996 Lamers claims Graves again said he could not afford to put her on hourly pay. On May 23, 1996 she proposed their dispute go to a third party. The following day she went to the Employment Standards Branch (“Branch”) and filed a complaint. Initially on the complaint form she indicated she had quit then later changed it to fired. She did not give notice to Graves of her intention to quit.

On May 25, 1996 Graves telephoned Lamers at home asking her to meet him at the office. When she arrived she saw her final paycheck on the desk. Lamers claims Graves terminated her offering her a further \$2,000.00 if she would sign a waiver of claim. She refused.

Graves argues Lamers terminated the contract which she had a right to do. There was only a relationship between the parties as long as each party was content that the terms of the contract were satisfactory.

Graves argues the work performed by Lamers was distinct, although it was part of the dental practice. He claims she practiced her craft without direction or interference. She performed her work in the manner she chose, with her own instruments which she was responsible for.

Lamers argues she only supplied her hand tools while Graves provided all of the other equipment and supplies which were considered part of the office.

Graves claims if Lamers performed work in a negligent fashion, both would be at risk of loss. On the other hand her profit was governed only by the percentage of her gross billings. Accordingly, her opportunity for profit was unlimited.

Lamers claims the clients she treated were Graves' and he controlled the number of patients. He owned the practice and building so she had no profit.

Graves submitted a summary of Lamers' earnings showing, on a per hour basis, a substantially higher rate was paid to Lamers than is currently being paid to his dental hygienist who is an employee. He claims in 1995 Lamers averaged \$34.12 per hour and in 1996 averaged \$38.02 per hour. The current dental hygienist rate is \$30.00 per hour plus benefits.

Lamers applied to Revenue Canada for a review of her status of employment with Graves. In a letter dated June 19, 1997 Revenue Canada ruled she was an employee for the purposes of Canada Pension Plan, Employment Insurance, and Income Tax.

The initial position of the investigating officer in a letter to Graves dated October 8, 1997, based on the information before him at that time, determined Lamers was an employee. This was later changed in the Determination.

ANALYSIS

Did Lamers enter into a contract for service with Graves? Yes, she intended to be more than a commissioned employee, both for the advantages of flexibility for her and the tax benefits of being an independent contractor.

Were the terms of the contract as she wanted? I am equally convinced they were not. It quickly became obvious Graves had a different understanding of the terms than did

Lamers. Graves had control as they were his patients, his office, and he set or controlled the hours. Graves effectively made Lamers “fit” in to his office routine.

Although we have no evidence of an investigation by the investigating officer of the comparison with Lamers’ contract with Dr. Chilibeck, on the basis of the evidence before me it was substantially different than Graves.

I believe a contract existed in both cases but the application of the terms varied considerably. The terms with Dr. Chilibeck are what, I believe, Lamers thought she had negotiated with Graves.

The *Act* defines an employee as:

"employee" includes

- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- and

"employer" includes a person

- (a) who has or had control or direction of an employee, or ...

In my opinion, Lamers’ relationship with Graves was one more of an employee/employer than that of an independent contractor.

On the four fold test, the weight of evidence favors Lamers. It is clear Graves exercised considerable control over Lamers. It was his office, his patients, his staff who did the bookings and he set the hours. His reluctance, if not refusal, to allow Lamers to work for other dentists and his refusal to put Lamers on salary when requested is a further example of this control over the employment relationship.

Contrary to the submission of Graves there was limited opportunity for profit. Lamers could only increase or decrease her earnings in a manner similar to a commission employee. The limit on the number of patients per day certainly limits the earning power when it is a direct percentage of the billings. In fact, the current dental hygienist, as an employee, is earning considerably more than Lamers who was only paid when she had a patient. She was not paid if a patient failed to attend an appointment or if no patients were booked for a time slot. The current dental hygienists is paid for a full 35-hour week.

There was a shared risk of loss in the event of any problems, however, Graves stood to lose much more than Lamers. Lamers had no interest in the building, office or equipment therefore a business failure would simply mean she was no longer employed. Lamers was protected by malpractice insurance which all dental hygienists are required to carry.

I believe both parties entered into the contract in good faith. However, their respective understanding of the terms was at odds from the beginning. The flexibility sought by Lamers was not there and the tax advantages were minimal. For Lamers, it became a contract of service not a contract for service as seen by Graves.

Both parties presented a number of authorities which I considered in addition to the evidence. One of the cases referred by Graves, *Hemming* (BC EST #D103/97), appears to lead us in the direction of the key differences between an independent contractor and an employee. In that case, Hemming worked for other employers contemporaneously. He operated an unrelated business with it's own contracts and employee. He set his own hours and suffered a risk of loss and a chance of profit as he invoiced directly. None of those elements are present in this case.

I believe *Thursday's Sport Plus Ltd.* (BC EST #D146/97), comes closer to the situation before us. The parties clearly intended to enter into a contract making Strang a contractor. However, pursuant to Section 4 of the *Act*, any agreement to waive the statutory requirements is of no effect. If the relationship between the parties is that of employee/employer the parties cannot agree to wave the provisions of the *Act*.

For the above reasons I find Lamers to be an employee within the meaning of the *Act* and is entitled to statutory holiday and vacation pay for the term of her employment with Graves.

In respect to severance pay, Lamers, without notice to Graves, filed a complaint with the Branch indicating her last day of work was May 23, 1996. Graves had decided at least on May 24 to terminate Lamers without notice on May 25, 1996. Lamers initiated a complaint. However, she at no time gave notice to Graves that she was terminating her employment. She did not carry through with her intention to quit before she was terminated. She is therefore entitled to payment in lieu of notice for length of service.

The matter is referred to the Branch to calculate the appropriate amount of wages owing.

ORDER

I order, under Section 115 of the *Act* the Determination dated July 18, 1997 be varied as set out above.

James E. Wolfgang
Adjudicator
Employment Standards Tribunal

JW:sr