

**DECISION OF ADJUDICATOR
IN THE MATTER OF AN ADJUDICATION PURSUANT TO SECTION 2-75
AND 4-6 OF *THE SASKATCHEWAN EMPLOYMENT ACT***

APPELLANT: REGINA'S PET DEPOT

RESPONDENTS: SHAUNA-RAE MISSICK and the DIRECTOR
OF EMPLOYMENT STANDARDS

DATE OF HEARING: June 10, 2019

PLACE OF HEARING: 3rd Floor Boardroom
1870 Albert Street
Regina, Saskatchewan



LRB File No. 125-19, Wage Assessment No. 1-000230

I. INTRODUCTION

Wage Assessment No. 1-000230 directed Regina's Pet Depot (Pet Depot) to pay \$2,256.41 to Shauna-Rae Missick or appeal pursuant to section 2-75 of *The Saskatchewan Employment Act* (the Act). Pet Depot appealed the Wage Assessment.

On June 10, 2019, the following individuals attended the hearing:

- Darlene Hincks, an owner and partner of Pet Depot;
- Lise Regnim, groomer at Pet Depot;
- Kelley Barney, groomer at Pet Depot;
- Rayna Hunt, groomer Pet Depot;
- Shauna-Rae Missick, former groomer at Pet Depot; and
- Andrew Langgard, Employment Standards Officer.

II. THE DISPUTE

On April 30, 2019, a Delegate on behalf of the Director of Employment Standards issued Wage Assessment 1-000230 against Pet Depot. Darlene, on behalf of the Partners of Pet Depot, prepared a notice of appeal by way of a letter dated May 10, 2019. The five-page letter provides a detailed account of Pet Depot's grounds for appeal and includes a copy of Andrew's letter (dated April 29, 2019) detailing the basis for the claim, Pet Depot's Independent Contractor Agreement, three statements prepared by Pet Depot groomers, and till receipts and Client Card notes for grooms performed by Shauna. Employment Standards received the notice of appeal on May 15, 2019.

If Shauna was an employee of Pet Depot when the store manager asked her to leave the premises on February 20, 2019, then she is entitled to pay instead of notice, vacation pay, and public holiday pay as claimed in the Wage Assessment. These are benefits afforded to employees under the Act. However, if Shauna was an independent contractor, then she is not entitled to these benefits. If Shauna was an independent contractor, then this is a contract dispute and falls outside the purview of the Act.

III. PRELIMINARY MATTERS/OBJECTIONS

At the beginning of the hearing, I explained the process to the parties and there were no objections to proceeding with the hearing.

Before the parties began leading evidence, I made an order for exclusion of witnesses.

IV. THE FACTS

The parties agreed that Shauna started working as a groomer at Pet Depot on May 20, 2018 and that she was sent home on February 20, 2019. The parties also agreed the amount of the Wage Assessment is correct should I conclude that Shauna was an employee of Pet Depot.

The parties tendered evidence by way of sworn testimony and documents. Darlene Hincks, Lise Regnim, Kelley Barney, and Rayna Hunt testified on behalf of the Appellant. Shauna-Rae Missick testified on behalf of the Respondents.

Employer Exhibits (Appellant)

ER1 – Till transactions and grooming notes for Shauna’s grooms (102 pages); and
ER2 – An unsigned copy of Pet Depot’s Independent Contractor Agreement (3 pages).

Employee Exhibits (Respondents)

EE1 – Employment Standards Officer’s worksheet outlining wages calculation (1 page);
EE2 – Saskatchewan Corporate Registry Profile Report for Regina’s Pet Depot (2 pages);
EE3 – SaskJobs advertisement for a dog groomer posted by Pet Depot on February 26, 2019 (3 pages);
EE4 – Email exchanges between Darlene and Andrew on March 25, 2019 and between Cindy Smith and Shauna on October 20, 2018 (2 pages);
EE5 – Printout from Pet Depot’s website (5 pages);
EE6 – Shauna’s Grooming Services Invoices (10 pages); and
EE7 – Pictures of grooming room (4 pages).

V. ARGUMENT

Before the hearing concluded, the parties provided oral closing arguments.

The Director of Employment Standards' argument is summarized as follows:

- The main question is: Whose business is it? Did Shauna own her own business or was she providing her labour and expertise in exchange for wages?
- The independent contractor agreement does not determine the legal status. Parties can not contract out of the Act.
- The criteria to consider when determining whether a person is an employee or independent contractor is set out by the Courts and applicable to the facts of this case as follows:
 - Shauna was not in control of her own pricing; Pet Depot had become increasingly displeased with her pricing and instructed her to charge less.
 - The evidence is mixed regarding whether she used her own tools. She did provide smaller hand tools but Pet Depot owned tables, bathtubs, the building, and they provided and paid for the utilities.
 - Shauna had no investment in her business. Pet Depot had the risk and the benefits. Weight should be given to what she did or did not do and not to what she could or could not have done.
 - Shauna's work was done in service of Pet Depot. It was not about her building up her own client base. Shauna did not have her own clients. They were Pet Depot's clients. From a public standpoint, it was Pet Depot's grooming business, not Shauna's. She did not provide personal contact information to her clients. She did not do her own advertising.
 - Shauna had no other source of income. She relied on grooming at Pet Depot for her income and did not provide grooming services elsewhere.
 - Grooming is prominently displayed on Pet Depot's website.
 - In two tax court decisions out of Ontario involving B-Pro Pet Grooming Academy Inc., pet groomers were held to be employees and not independent contractors.
 - Being paid a commission does not mean that a person is a contractor.
- The grooming business was Pet Depot's. Shauna was an employee and is entitled to the minimum benefits provided by the Act, including public holiday pay, vacation pay, and pay instead of notice.
- The Wage Assessment ought to be upheld and the appeal dismissed.

Pet Depot's argument is summarized as follows:

- The grooming room is a contained and separate room from the retail store.
- Shauna agreed to be a contractor. She knew what the arrangement was.
- She was involved in negotiating her contract. She agreed to earn 55% commission to start and had the ability to earn a higher commission (60 and 65%) when her sales met certain targets.
- Her testimony is the only testimony that is different from all the rest.
- Groomers are similar to hair stylists in that they are independent contractors who essentially rent their space.

- It would be more beneficial to her as an employer to hire employees on commission. She would then have more control over them and would be able to dictate how they did their jobs. This arrangement, however, was a win-win for everybody because the three owners of Pet Depot all have other businesses/jobs and are not in the store. She only ever talked to Shauna once about pricing and that was because the other groomers asked her to help. They were unable to get through to Shauna so she agreed to talk to her for them.
- Shauna chose not to do any of the things the other groomers did to grow their businesses. She did not make her own business cards or have Pet Depot do it for her. She was the only groomer without a business card. She did not do any advertising. She did not hire a helper.
- Shauna became a problem soon after she started. The grooming team did not want Shauna there.
- The tools/equipment that Pet Depot left in the grooming room for the groomers to use as part of their business was junk. The tub and table were not in working order.
- The money left over for Pet Depot, after commissions to groomers were paid, only covered phones, utilities, insurance, etc. It covered Pet Depot's expenses in offering grooming as a service to its customers and nothing more. The commissions were negotiated with these expenses in mind.
- Why would the groomers invest their time and money in the grooming room if they were not in business for themselves? The grooming group only invested significant time and money on improvements after Shauna left because they did not want her to be a part of it. They could not work with her but did not know how to get rid of her.
- No terms were ever dictated to the groomers. They were 100% in control of grooming and its pricing.
- She provided Invoices to Shauna as a courtesy so that she could have a record of her earnings. Pet Depot never provided pay stubs to Shauna or the other groomers.
- When Shauna left, customer complaints stopped and the other groomers are now reaching targets allowing them to earn 65% of their sales. Shauna had a negative effect on her fellow groomers.
- While Shauna was at Pet Depot, she never said a thing about being an employee. She knew she was a contractor. She took advantage of earning 55% commission on her sales and now wants vacation pay, public holiday pay, and pay instead of notice. Had she been an employee, she would have earned \$12-15 per hour which would have been a lot less than she actually earned.
- Shauna mentioned being a groomer at Pat's Pets as an employee previously but their model is completely different. They have no separate grooming room.
- Three groomers here are devastated by what this might mean. Pet Depot and the groomers thought they were operating properly. It would cost less to pay groomers as employees but then Pet Depot would not be able to hire quality

groomers. They will have to shut the grooming down if Shauna is found to be an employee. One person is wrecking it for everyone.

VI. ANALYSIS AND DECISION

The issue to be determined in this case is whether Shauna was an employee of Pet Depot or an independent contractor. If Shauna was an employee, she is entitled to the benefits of the Act and the Wage Assessment must be upheld. If Shauna was an independent contractor, the Act does not apply and the Wage Assessment must be dismissed.

Darlene, Lise, Kelley, and Rayna vehemently deny that groomers at Pet Depot are employees. The groomers say it was clear from the start of each of their arrangements with Pet Depot, that they were independent contractors. They compare themselves to hairdressers who rent chairs at a hair salon. The standard in the grooming industry is for groomers to operate as independent contractors because they make more money that way. Darlene says she would be unable to hire quality groomers if it were an employment arrangement and that she will close the grooming salon if it is determined that groomers are employees. Lise, Kelley, and Rayna agree with Darlene. They say they would not stay on at Pet Depot if it is determined that they are employees as opposed to independent contractors. They have the opportunity to earn more money as independent contractors and rely on the ability to write-off their expenses.

According to the uncontroverted evidence, Shauna started as a groomer at Pet Depot on May 20, 2018. Despite responding to a SaskJobs advertisement (like EE3) that seemed to suggest an employment arrangement, Shauna admits that she understood from the start that she was an independent contractor. In fact, Shauna was involved in negotiating her contract (ER2) which increased the level of independence and commissions for groomers starting on or after her. There is no doubt that Shauna believed she was an independent contractor. At some point, however, there was a shift and she began to wonder if she was actually an employee.

In Andrew's letter to the partners of Pet Depot dated April 29, 2019 (Exhibit "A" to the notice of appeal), he refers to caselaw that establishes the appropriate considerations in determining whether a person is an employee or independent contractor. The B-Pro Grooming cases filed in support of his oral argument also reference the appropriate caselaw. As summarized by the Supreme Court in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, at paragraphs 47-48:

...The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making the determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the

worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

Based on the totality of the evidence, I find that Shauna was an independent contractor and not an employee of Pet Depot. In making this determination, I have considered the factors outlined by the Supreme Court in the context of the particular facts of circumstances of this case, as follows:

Level of Control

The evidence shows that groomers at Pet Depot had control of the grooming salon and the services they provided. The Independent Contractor Agreement (ER2) that Shauna helped negotiate and signed states that groomers are contractors working on commission and that they "shall have complete control of the methods, procedures, results and all treatment planning for the delivery of pet grooming services." I believed Darlene's explanation of why the partners of Pet Depot allowed the groomers to act independently and run their own business. She said that she and her partners were busy with other business pursuits and were most often not in the store. They wanted to provide pet grooming services to their retail customers as way of servicing their needs and bringing them into the store to shop while their pets were being groomed. She described it as a synergistic relationship. The groomers ran their business and it benefited the store while the store also brought in customers who in turn might book their grooming with one of the grooming partners. Darlene said she would not have even known what was going on with Shauna except that the other groomers approached her for help. This was the only reason she stepped in and talked to Shauna on their behalf.

Kelley and Lise's evidence supports Darlene's position that she was not involved in managing the grooming salon. Lise said that when Darlene came to the store to talk with Shauna on February 16, 2019 (at Lise's request) that it was only about the fourth time she had ever even seen Darlene. Lise was intimidated by Shauna. She had tried to raise concerns with Shauna about her lateness, poor attitude, the excessive and inconsistent length of her grooms, excessive charging of clients for services, and how this was affecting the reputation of the groomers as a group, but Shauna was defensive and combative. Kelley said that the reason they involved Darlene was that their reputation as groomers was being negatively affected by Shauna's actions and that Darlene had been the one to initially sign the contract with Shauna. She therefore saw it as a contract issue that Darlene could help with.

Lise testified that the groomers operated totally independently from the store. They had their own room at the back of the store (EE7). As a group, the groomers came up with pricing for their services without input from Pet Depot employees or owners. The groomers made their own signs about pricing for services and charges for missed appointments. The only input from Pet Depot was that they were once asked to move their signs from a shared wall into their own space. When the group decided they wanted to hire another groomer, it was Lise who found Kelley and interviewed her. Lise also testified that she set her own hours and often started before the store was open. She had her own keys and security code access. If for some reason she could not make a scheduled appointment, she rescheduled it herself or had one of the other groomers cover for her. She said nobody told her how to do her job or what to charge. The staff at the till always charged grooming customers what the groomer's said. The only reason she took issue with what Shauna was charging was that Shauna's excessive charges were reflecting badly on her own reputation as a groomer at Pet Depot. If the staff received complaints about grooming, they did not deal with the complaints. They were always referred back to the grooming group.

Another example that Lise provided of the grooming group's independence from Pet Depot and its owners is that after Shauna left, the group completed a number of improvements to the grooming salon including new paint and electrical. When Darlene walked in, she was surprised at all the work they had done. The groomers had not sought the approval or input from the owners of Pet Depot before making the improvements.

Kelley confirmed that the groomers operated independently from the store. She never had an employee at the till reject a price she charged. She set her own hours and had no idea why Shauna would say that she was limited to working store hours. This was not true. They all had keys and security codes and were in charge of their own schedules. She also confirmed that Shauna's behaviour was affecting her reputation as a groomer and her ability to grow her business. Clients did not know that they were independent contractors so if they were overcharged by Shauna, it reflected badly on all of the groomers.

Rayna confirmed that she had total control over her business. She has been a groomer for 21 years and has always been a contractor. She confirmed that she had a key to the store and 24-hour access to the grooming salon. She also stated that she often started her day before the store opened. She said she was not limited in what she charged her clients and that she has never changed or been questioned on a charge by anyone at Pet Depot. Almost all of her clients are her own clients who followed her to Pet Depot when she started there.

Shauna admitted that she negotiated her contract and a higher rate of commission than was initially offered. She also admitted to having control over how to groom the pets and over her work schedule. She determined her availability and had the ability to

decline work. There were incidences, however, that made her question whether she was a fully independent businessperson. One example she gave was that she was questioned by her fellow groomers, and ultimately by Darlene, about some of her grooming charges. Another example involved an email she received from Cindy Smith, one of Pet Depot's partners (EE4). The email relates to a heated exchange between Cindy and Shauna arising from a conversation about Shauna's refusal to clip a dog's nails while she was working and a customer complaint. The language chosen by Cindy includes referring to herself as an "employer" wanting to be treated with greater respect by Shauna.

Regarding the first example, Shauna's fellow groomers admitted to talking to her about the effect they believed her excessive charges were having on them and to asking for Darlene's help in talking to her on their behalf. At the end of the day, however, the evidence clearly establishes that every charge that Shauna put through the till was charged to the customer. Regarding the second example, Cindy used potentially misleading language when referring to herself as an employer, but the email ends with Cindy stating, "Additionally, the customer complaint was resolved today with just a discussion, not a free groom which you demanded." From this wording, it does not sound like Cindy felt she had any real control over how Shauna conducted her business. As it relates to determining Shauna's employment status, the language in the email is contradictory, at best.

I find that Shauna was in control of if, when, and how she performed her work. She did not have to perform services at certain times, using procedures set for her by someone else. How she chose to schedule her day and perform her tasks were left completely to her discretion. Although Shauna's high level of control over the performance of her work is not conclusive, it is indicative of an independent contractor relationship.

Own Equipment

When Darlene negotiated the contract with Shauna, it was agreed that Pet Depot would leave an old bathtub and broken table in the grooming room on an "as is" basis and that any maintenance or improvements would be up to the groomers. The contract specifically states:

- b. The contractor shall provide all towels and laundry service to clean towels, all cleaning products and equipment to perform grooming.
- c. The grooming equipment that is in the grooming room as of June 1, 2018, will be left in the grooming room in as is condition. It will be the responsibility of the contractor to make any repairs required to the equipment or purchase other equipment that may be required.

Andrew argued that the evidence on Shauna having her own tools was mixed. I do not agree with his conclusion. The evidence is clear that the only equipment provided by Pet Depot was turned over to the groomers to be maintained and operated at their

expense. All of the groomers testified to owning their own small tools, including Shauna. Kelley salvaged a broken table, repurposed it, and this was the table that Shauna used. Kelley testified that the bathtub would not be in working order without their efforts. Rayna had her own tools, table, kennels, and dryers. The groomers provided their own towels, laundry service, shampoo and other cleaning products, as well as dryers. Based on the evidence, I find that Pet Depot did not supply equipment to the groomers other than an initial gift of used equipment that was transferred to the groomers on an “as is” basis. Ultimately, the groomers were responsible for their own tools and equipment.

Although Pet Depot owned or leased the space that the grooming salon operated out of and was responsible for the utilities, I accept Pet Depot’s argument that this is similar to a hair salon own who rents out chairs to hairdressers. Just because the groomers did not own the space, does not mean they were not running their own businesses in that space. The evidence establishes the groomers were in charge of the grooming space and equipment.

Hiring of Helpers

The evidence suggests that while Shauna did not in fact hire a helper, she could have done so had her workload supported it. Lise said that she and Shauna discussed hiring Shauna’s sister to do the laundry but they did not end up hiring her. Rayna testified that she employs a bather so that her day is freed up to be working on other dogs.

Degree of Financial Risk/Degree of Responsibility for Investment and Management

Andrew argued that Shauna had little or no investment in her business and that she relied solely on Pet Depot to book grooming appointments. In his view, Shauna was clearly integrated into Pet Depot’s business – not her own.

The evidence establishes that the groomers invested their time and money to operate and maintain the salon. Without operational equipment, they would be unable to carry out their grooming services. Pet Depot did not invest money in the grooming salon aside from the original gift of some used equipment on an “as is” basis. Although the evidence establishes some of the groomers invested more time and money than others, they all risked lost earnings should they fail to keep the grooming room in proper working order.

The evidence also establishes that Lise, Kelley, and Rayna held off on completing many of their planned improvements until Shauna was gone. Given the difficulties they were having with her, it did not make sense to spend too much money until they were comfortable moving forward with all members of the grooming group. The improvements completed after Shauna’s departure included new paint and electrical which was done on their own time and at their own expense.

In comparison to the other groomers, the evidence shows that Shauna invested the least into growing her business. I do not, however, find that this means she was not an

independent contractor. Rather, I think it means that she failed to reach her potential as an independent contractor.

Opportunity for Profit in Performance of Tasks

The evidence establishes that the groomers had the opportunity to earn commission at higher rates as they met specified targets. Clearly, they were not salaried employees or persons with a set remuneration. Further, the evidence leads me to conclude they were not commissioned employees. Shauna had the opportunity to earn money above and beyond the money she earned up to and including May 20, 2019. She was in charge of the hours she chose to work and the prices she charged for her services. There is evidence to suggest she sometimes refused to take on services that were offered to her such as nail clipping. The other groomers testified that she was often late for work and would refuse to take on clients nearing the end of her workday because she wanted to catch an earlier bus home.

Moreover, Shauna chose not to do any individual advertising or even to obtain business cards, despite evidence that both of these options were available to her. Had she wanted Pet Depot's help, they would have even printed up business cards for her. The other groomers had business cards and some of them did their own advertising, separate and apart from any of Pet Depot's advertising. For example, Lise sponsored a roller derby team and advertised "Grooming by Lise." Although Shauna seemed uninterested in taking the steps necessary to grow her clientele and to earn more money, she was the one in control of her ability to profit, not Pet Depot.

Additional Considerations

In coming to the conclusion that Shauna was an independent contractor, I also gave some weight to the method by which Pet Depot paid the groomers. Pet Depot did not provide the groomers with pay stubs and did not withhold income taxes. The groomers were not issued T4's. While none of this is determinative of the issue, it is consistent with how independent contractors are treated, as opposed to employees. Kelley testified that she worked some hours in Pet Depot's store and that she received a pay stub as an employee for these hours. She earned \$12.00 per hour as a Pet Depot employee. Her store hours were paid separately (and the method was different) from the commission she earned as a groomer.

Andrew provided me with a copy of the B-Pro Grooming Academy Inc. tax cases out of Ontario as support for his argument that courts have found groomers to be employees. I find these cases to be distinguishable on the facts. In the B-Pro cases the evidence established the employer had significant control over the workers' activities. One of the groomers testified that she was supervised at all times either by the owner or by one of the other workers. She was told when she must be present, both as to days and times, and had to deal with the animals needs as arranged by B-Pro. She could take time off only with B-Pro's permission. This testimony concerning control was found to be convincing. These groomers also had no opportunity for profit except to spend more


time at work. Each was paid on an arranged daily rate set by B-Pro. For these reasons, I find these cases to be distinguishable.

When taken as a whole, the particular facts and circumstances in this case reveal that Shauna was an independent contractor. She negotiated her own contract and commission structure, worked independently from anybody at Pet Depot, set her own hours and prices, used her own equipment or borrowed items from her grooming partners, and was in charge of how or if she wanted to grow her business. Shauna was not an employee of Pet Depot and is therefore not entitled to the benefits afforded to employees under the Act.

VII. CONCLUSION

The appeal is allowed and the Wage Assessment is dismissed.

DATED in Regina, Saskatchewan, this 7th day of August, 2019.


Jodi C. Vaughan
Adjudicator

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at www.saskatchewan.ca.

Right to appeal adjudicator's decision to board

4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

- (3) A person who intends to appeal pursuant to this section shall:
 - (a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and
 - (b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.
- (4) The record of an appeal is to consist of the following:
 - (a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;
 - (c) the notice of appeal filed with the director of employment standards pursuant to Part II;
 - (d) any exhibits filed before the adjudicator;

- (e) the written decision of the adjudicator;
 - (f) the notice of appeal to the board;
 - (g) any other material that the board may require to properly consider the appeal.
- (5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.
- (6) The board may:
- (a) affirm, amend or cancel the decision or order of the adjudicator; or
 - (b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board

Appeal to Court of Appeal

- 4-9**(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.
- (2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.
- (3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

Right of director to appeal

- 4-10** The director of employment standards has the right:
- (a) to appear and make representations on:
 - (i) any appeal or hearing heard by an adjudicator; and
 - (ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and
 - (b) to appeal any decision of an adjudicator or the board.