In the Matter of

FRANCES E. BRISTOW,

dba Bristow & Associates Personnel Agency, Respondent.

Case Number 30-97
Final Order of the Commissioner
Jack Roberts
Issued June 11, 1997.

SYNOPSIS

Respondent, who operated a private employment agency, employed claimant as a recruiter. Applying the "economic reality" test, the Commissioner held that claimant was not an independent contractor. Respondent failed to pay claimant all wages due upon termination, in violation of ORS 653.025(3) (minimum wages) and ORS 652.140(1). ORS 652.140(1), 652.360, 653.025(3), 653.035(2), 653.055(1) and (2), and OAR 839-20-010.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 11, 12, 24, and 25, 1997, in Suite 220 of the State Office Building, 165 East Seventh Avenue, Eugene, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Jeanne Marie Kramer (Claimant) was present throughout the hearing. Frances E. Bristow (Respondent) was present and represented herself throughout the hearing.

The Agency called the following witnesses: Kimberley Arrington, a former

employee of Respondent; Ione Brown, a licensing specialist with the Agency; Ronda DePoe, a former employee of Respondent; Kristin Justice, a former employee of Respondent; Jeanne Kramer, the Claimant; Marie Moser, a former employee of Respondent; Stephanie Raglin, a former employee of Respondent; and Lynne Sheppard, a compliance specialist with the Wage and Hour Division of the Agency.

Respondent called the following witnesses: Dave Altman, owner of Altman Office Furniture; Frances Bristow, Respondent; Dina DeVaney, operations manager for Nichols Products; Tobin George, a manager for Champs; Wanda Hehn; Jeanne Littleton, Consolidated Secretarial Services; Diana Morrow; Tony Rosta, attorney; Kent Russo; Tom Schoff, a financial planner; and Sandy Spitzer, Spitzer Consulting.

Administrative exhibits X-1 to X-29, Agency exhibits A-1 to A-48, and Respondent exhibits R-1, R-2, R-4 to R-8, and R-10 to R-17 were offered and received into evidence. The ALJ did not receive R-3 or R-9. The record closed on March 25, 1997.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT -- PROCEDURAL

1) On July 23, 1996, Claimant filed a wage claim with the Agency. She alleged that she had been employed by Respondent and that Respondent had failed to pay wages earned and due to her.

2) At the same time that she filed the wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondent.

3) On September 26, 1996, the Agency served on Respondent an Order of

Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed Claimant a total of $2,586.38 in wages and $1,140 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges.

4) After receiving an extension of time, on October 30, 1996, Respondent, through her attorney, filed a timely answer to the Order of Determination and requested a contested case hearing. In her answer, Respondent denied that she owed Claimant the alleged unpaid wages and set forth as affirmative defenses that she was financially unable to pay such wages, that Claimant did not request and Respondent did not intentionally withhold the alleged wages, and that Claimant was an independent contractor.

5) On December 20, 1996, the Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050- 0440. Upon the motions of the participants, the hearing date was postponed twice. It was finally set for March 11, 1997.

6) On January 8, 1997, the ALJ issued a discovery order directing each participant to submit a summary of the case, including a list of the witnesses to be called and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-050-0210(1). The summaries were due by February 18, 1997.

The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary. The Agency submitted a timely summary.

7) On January 29, 1997, the Agency moved for a discovery order, with attached exhibits showing the Agency's attempts to obtain Respondent's records through an informal exchange of information. On January 30, 1997, the Agency requested that the motion be held in abeyance because Respondent's counsel said the requested discovery would be provided voluntarily. Thereafter the Agency did not renew the motion. However, Respondent did not provide the requested records to the Agency.

8) On February 17, 1997, Respondent's attorney withdrew as attorney of record.

9) On February 18, 1997, Respondent and the Agency each requested additional time to obtain certain records to supplement their case summaries. The Agency had already submitted its summary with a supplement. The ALJ ordered Respondent to submit her case summary that day, and granted Respondent and the Agency until February 21, 1997, to supplement their summaries with additional exhibits. Respondent mailed and faxed a list of witnesses and a list of exhibits on February 18, 1997, but did not include copies of exhibits. On February 19, 1997, the Agency supplemented its case summary. On February 21, 1997, Respondent sent the forum supplemental lists of witnesses and exhibits, but no exhibits were attached. On February 28, 1997, Respondent submitted another list of witnesses and exhibits, along with copies of the listed exhibits. On March 5, 1997, the Agency again supplemented its case summary with newly discovered exhibits.

10) On March 7, 1997, the ALJ conducted a prehearing conference by telephone with the participants.

11) At the start of the hearing on March 11, 1997, Respondent said she had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

12) Pursuant to ORS 183.415(7), the ALJ explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

13) At the start of the hearing, the Agency moved to amend the Order of Determination. The amendment reflected a decrease in the amount of wages claimed due, from $2,586.38 to $2,289.52, and asked to delete its claim for penalty wages. Respondent did not object and the ALJ granted the motion. During the hearing, the Agency again moved to amend the Order of Determination to conform to the evidence, reducing the amount of wages claimed due from $2,289.52 to $2,137.52. The ALJ granted that motion.

14) Before the hearing resumed on March 13, 1997, Respondent contacted the Administrative Law Judge and said she was ill. The ALJ postponed the hearing and, following a conference call on March 17, 1997, set the hearing to resume on March 24, 1997. During the conference call, Respondent asked the ALJ to issue subpoenas on her behalf. The ALJ directed her to submit in writing the names of witnesses she wanted subpoenaed and, with the names, to make a showing of the general relevance and the reasonable scope of the evidence sought by 9 a.m., Thursday, March 20, 1997. The ALJ scheduled a conference call for 2 p.m. on March 20, 1997. Respondent submitted a list of names but did not make the required showing. She did not respond to the conference call March 20. On March 21, 1997, Respondent requested a postponement of the hearing. The Agency objected to the request and the forum denied it.

15) On May 13, 1997, the Administrative Law Judge issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions to the Proposed Order. The Hearings Unit received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, the Respondent, a person, did business as Bristow & Associates Personnel Agency in Eugene, Oregon. She was a sole proprietor with 100 percent interest in the business. She employed one or more persons in the State of Oregon. She was licensed as a private employment agency.

2) In mid-October 1994, Respondent contacted Kristin Justice and offered her services as an employment agency. Later that month, they discussed Justice doing recruiting and marketing work for Respondent. They reached a verbal agreement that Justice would work for an annual salary of $20,000 plus commission. Justice was employed by Respondent from November 14, 1994, to January 20, 1995. Respondent changed the terms of their compensation agreement frequently. In addition to performing the duties of a recruiter, Justice developed a company logo, prepared advertising for the business, and performed clerical tasks, such as greeting clients, retrieving telephone messages, answering the telephone, scheduling appointments (for herself and the other recruiters), filing, typing, sending faxes, running errands, and maintaining the office. Respondent expected Justice to be in the office from 8 a.m. to 5 p.m. Justice estimated that she earned $3,334 in salary plus a minimum of $2,236 in commissions. After she demanded and received no pay, Justice contacted an attorney in March 1995. Following negotiations between their attorneys, Justice and Respondent settled the wage claim in May 1995 for $4,000, which included six monthly payments beginning on June 1, 1995. As of March 11, 1997, Respondent had not paid

off the wages owed to Justice.

3) In 1995, Respondent sought advise from attorney Anthony Rosta about hiring recruiters as independent contractors.

4) From February 3 to March 15, 1995, Respondent employed Kimberley Arrington. Arrington's duties included greeting clients (job applicants), answering the phone, handing out forms, typing, and calling employers to find out whether they had open positions. Respondent paid Arrington by the hour.

5) From March 16 to 28, 1995, Respondent employed Stephanie Raglin as a secretary. Raglin was paid by the hour and performed clerical duties, including greeting clients, typing, filing, and answering the phone.

6) From April to October 1995, Respondent employed Marie Moser as a secretary. Respondent had Moser sign a "Nondisclosure and Noncompete Agreement." The office hours were generally from 9 a.m. to 5 or 5:15 p.m. Moser was paid by the hour and performed clerical duties, including greeting clients, typing, filing, and answering the phone. She also performed some duties normally performed by recruiters, such as "cold calling" employers, setting up applicant interviews, and trying to make employment placements.

7) In April 1995, Ronda DePoe signed a contract authorizing Respondent to assist her in securing employment. In June 1995, DePoe entered into an employment relationship as a recruiter with Respondent. DePoe was not licensed as a recruiter and had never worked as a recruiter. DePoe's duties included answering the phone; contacting employers about open positions; advertising for job openings; interviewing clients; filling out job orders, job referrals, and other forms; and arranging for the placement of clients. Initially, Respondent verbally agreed that DePoe was an employee and would earn a 30 percent commission with a guaranteed minimum of

$2,000 per month. She agreed to withhold taxes from DePoe's pay checks. A couple of days after DePoe started working, Respondent changed the compensation agreement. Under the new agreement, DePoe would receive a 1099 form at the end of the year (there were no taxes withheld), she was to be paid on commission only, there were no benefits, she had to sign a nondisclosure-noncompete agreement, and she was required to follow the employee handbook. Respondent changed the commission arrangement several times during DePoe's employment, as other recruiters joined and left the business. DePoe quit on August 7, 1995, because she thought Respondent was cheating her on commissions.

8) From around January to March 1996, Respondent employed Diane Morrow as a recruiter. Respondent trained Morrow, who had never been an employment agency recruiter before and was never so licensed. Morrow signed Respondent's noncompete agreement. Although she did not know the legal difference between an employee and an independent contractor, Morrow believed she was an independent contractor paid on a commission basis. She never received any pay for her work. Her schedule was her own. While the office hours varied, they were usually from 8 a.m. to 5 p.m. She performed her own secretarial tasks, such as filing, typing, mailing, and answering phones.

9) In August 1995, Claimant used Respondent's agency to help her find a job. Respondent referred Claimant to a medical office for a job interview, but she did not get the job. As part of her ongoing job search, Claimant sent Respondent two résumés in November 1995. Claimant had experience as a secretary, bookkeeper, and office manager. She was seeking employment in a medical or business office. At some point, Claimant began working in an office of H & R Block. That job was scheduled to end on April 15, 1996, so in mid-February 1996, Claimant again contacted Respondent

for help finding a new job. Respondent later discussed with Claimant the possibility of Claimant working for Respondent as a recruiter. Claimant had no experience or training as a recruiter, had never sought work as a recruiter, and was not licensed as a recruiter. Respondent offered to train her. Claimant asked for and needed a base wage, but Respondent could offer her only a commission wage.

10) On March 5, 1996, Respondent hired Claimant as a recruiter. Claimant signed a document entitled "Commissioned Independent Contractor, Local and National Recruitment Placement Job Description, Employment Agreement." The document listed "Office Procedure[s]" including, among other things, that Claimant would receive a 1099 form at year end, commission payments were paid monthly based on collected funds, there were no benefits, Respondent's records were confidential, there was a noncompete agreement, Respondent could terminate the agreement at will, and Respondent's employee handbook would be followed regarding all other procedures. Claimant was hired for an indefinite period. Respondent furnished all of the equipment and supplies Claimant used on the job.[1] Respondent detailed and controlled how Claimant was to perform her duties. Respondent set the office hours, which varied but were generally from around 8 a.m. to 5 p.m. Claimant was to be paid on a commission basis. She was not allowed to hire her own employees. She worked for only Respondent during times material herein. She signed a "Nondisclosure and Noncompete Agreement" with Respondent that identified Claimant as an employee and prohibited her from operating or being employed by an employment agency for two years following termination of employment. Claimant derived no benefits other than commissions from her work for Respondent. She had no ownership interest in Respondent's business, did not share in the business's profits, and had no liability for its losses. Claimant was not Respondent's business partner.

11) Initially, Claimant had no skills as a recruiter, so Respondent assigned her work duties and trained her. Under Respondent's close supervision, Claimant filed Respondent's employer contact cards in alphabetical order; answered the phone; took messages; handled incoming mail; typed letters; performed other secretarial duties, such as typing labels and setting up new files; checked with employers by phone and by letter to discover their needs for employees; took job orders from employers; filled out job order forms, applicant contracts, and job referral forms; referred applicants to employers for interviews; and kept records of contacts with employers and applicant referrals. Respondent took Claimant to a Eugene Chamber of Commerce meeting so Claimant could develop contacts with community business people. Respondent moved her office in April 1996. Claimant helped with this move. Over time, Claimant required less supervision of her assigned work and performed some duties by herself.

12) At some point during her employment, Claimant did some typing about the Bristow family heritage, which was later included in Respondent's business brochure.

13) Claimant obtained the business cards of 20 men with whom her late brother had done business. Claimant gave the cards to Respondent in the hope of generating job orders.

14) Respondent and Claimant met with Tom Schoff for retirement planning. Respondent characterized Claimant as an independent contractor.

15) During her employment with Respondent, Claimant considered starting her own bookkeeping business. She started gathering information about starting a new business.

16) Between March 5 and April 15, 1996, Claimant also worked for H & R Block each day (Monday to Friday) from 10 a.m. to 5 p.m. During this period, she

worked for Respondent from around 7 to 9:45 a.m., and again from around 5 to 7:30 p.m. each Monday through Thursday, or around 4.5 hours per day. She worked only three hours on one Thursday. On Fridays she worked two to four hours for Respondent. During this period, she worked a total of 117.5 hours. Beginning on April 16 and until she was discharged on June 28, 1996, Claimant generally worked eight hours per day Monday to Thursday.[2] On Fridays, her work time varied from 1.5 to 8 hours each day. She did not work during the week of May 5 to 11, 1996, except for eight hours worked on Monday, May 6, 1996. She did not work during the week of June 16 to 22, 1996. During the period April 16 to June 28, 1996, Claimant worked a total of 332.5 hours. During the entire period of her employment with Respondent, Claimant worked a total of 450 hours. Respondent kept no time records for Claimant

17) Respondent discharged Claimant on June 28, 1996.

18) Respondent paid Claimant no compensation for her personal services rendered to Respondent in Oregon.

19) At times material, the minimum wage in Oregon was $4.75 per hour, pursuant to ORS 653.025(3).

20) The forum found Claimant's testimony to be credible. She had the facts readily at her command and her statements were supported by documentary records. There is no reason to determine the testimony of the Claimant to be anything except reliable and credible.

21) Agency Compliance Specialist Lynne Sheppard contacted 10 private employment agencies in the Eugene area. None used a recruiter who was an independent contractor. Employees of a licensed private employment agency are not required by state law to be licensed. A recruiter working as an independent contractor is required by state law to be licensed.

22) During all times material, Respondent used a bookkeeper, Jeanne Littleton, to handle payroll. Based on information she got from Respondent, Littleton computed the withholdings and made out W-2 forms for the hourly employees and for Kristin Justice. Littleton also made out the 1099 forms for other recruiters (that is, besides Justice). From information she got from Respondent, Littleton did not consider the recruiters to be Respondent's employees.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person who engaged the personal services of one or more employees in the state of Oregon.

2) Respondent employed Claimant from March 5 to June 28, 1996.

3) Respondent discharged Claimant on June 28, 1996.

4) During the wage claim period, that is, from March 5 to June 28, 1996, Respondent and Claimant had an agreement whereby Claimant would be paid on a commission basis. Claimant earned no commissions.

5) The state minimum wage during 1996 was $4.75 per hour.

6) Claimant worked 450 hours for Respondent. At the minimum wage of $4.75, Claimant earned $2,137.50 in wages. Respondent has paid Claimant nothing and owes her $2,137.50 in earned and unpaid compensation.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

2) ORS 653.010 provides in part:

> "(3) 'Employ' includes to suffer or permit to work; * * *.
>
> "(4) 'Employer' means any person who employs another person * * *."

ORS 652.310 provides in part:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees * * *.

"2) 'Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

3) ORS 653.025 requires that:

" * * * for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

"* * * * *

"(3) For calendar years after December 31, 1990, $4.75."

Respondent was required to pay Claimant at a fixed rate of at least $4.75 per hour. Respondent failed to pay Claimant the minimum wage rate of $4.75 for each hour of work time.

4) ORS 652.140(1) provides:

"Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination."

Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than the end of the first business day after discharging her from employment on June 28, 1996.

5) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has

the authority to order Respondent to pay Claimant her earned, unpaid, due, and payable wages, plus interest on that sum until paid. ORS 652.332.

OPINION

CLAIMANT WORKED AS AN EMPLOYEE

Respondent contends that Claimant was not an employee, but was hired as an independent contractor. The Agency contends that Claimant worked as an employee.

"'Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate * * *." ORS 652.310(2); *Lamy v. Jack Jarvis & Co., Inc.,* 281 Or 307, 574 P2d 1107, 1111 (1978); *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 40-41 (1993).

Oregon statutory law does not define "independent contractor" for purposes of wage claim law. This forum has adopted an "economic reality" test to determine whether a claimant is an employee or independent contractor under Oregon's minimum wage and wage collection laws.[3] *In the Matter of Geoffroy Enterprises, Inc.,* 15 BOLI 148 (1996) (relying on *Circle C Investments, Inc.*, 998 F2d 324 (5th Cir 1993)). The focal point of the test is "whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which she renders her services." *Geoffroy Enterprises, Inc.*, 15 BOLI at 164. The forum considers five factors to gauge the degree of the worker's economic dependency, with no single factor being determinative. These factors are:

> (1) The degree of control exercised by the alleged employer;
>
> (2) The extent of the relative investments of the worker and alleged employer;
>
> (3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer;
>
> (4) The skill and initiative required in performing the job;

(5) The permanency of the relationship. *Id.*

In this case, the preponderance of credible evidence on the whole record establishes the following:

(1) The degree of control exercised by the alleged employer

Respondent exercised extensive control over Claimant's work. During the training period -- which Claimant believed covered the entire period of her employment, and Respondent said lasted until around April 15, 1996 -- the evidence is uncontroverted that Respondent closely supervised Claimant's activities.

Respondent set the office procedures and required Claimant to follow them. She set the office hours, dress code, and "mannerisms." She listened to Claimant's phone conversations and instructed her how to converse. She taught Claimant how to fill out all of Respondent's forms, and taught her what questions to ask. She established the compensation method. She prohibited Claimant from competing with her. Even after Claimant became more self-sufficient and scheduled her own work, she was still under Respondent's control, in that Respondent expected Claimant to continue following Respondent's practices and procedures. Respondent exercised control over Claimant in a wide-ranging way that indicates an employer-employee relationship.

(2) The extent of the relative investments of the worker and alleged employer

Respondent supplied the office, phones, desks, chairs, typewriters, computer, calculators, stationary, records, forms, postage, and all of the other equipment and supplies Claimant used to perform her job, except that, near the end of her employment, Claimant brought in her own typewriter and calculator.[4] Respondent had the private employment agency license necessary to operate the business. She paid the bills. Claimant had no financial interest in the business. I conclude that Claimant's investment in her job was relatively minor compared with Respondent's investment in

her business, and this indicates an employee-employer relationship.

(3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer

Respondent established the terms of the compensation agreement with Claimant. Although Claimant ultimately agreed to Respondent's terms, this was a take-it-or-leave-it offer. Claimant wanted and needed a base wage, but was so persuaded by Respondent's assurances of future commissions that she accepted the offer.

There was no opportunity for Claimant to suffer a loss, except insofar as she would earn no commission for her work. Claimant's initiative and hard work would obviously influence her opportunity to earn a commission from Respondent. However, the commission system Respondent set up significantly influenced Claimant's opportunity for income, or profit. Under the system, the most Claimant could earn from an account was 30 percent of the net fee received. That commission would be split if Respondent also worked on the account (such as by obtaining the job order or making the job placement). Respondent could change the applicants' fee schedule and was able to give discounts on fees, both of which would influence the amount of commissions Claimant could earn.

Further, Respondent could terminate Claimant's employment agreement at will. Following termination, Claimant would get no compensation for work performed on any account where the applicant had not started work before Claimant's termination date. Additionally, the evidence persuasively shows that Respondent unilaterally changed recruiters' compensation agreements when she thought it was fair or necessary to do so.

Finally, it should be noted that this method of compensation -- commission only -- is not by itself indicative of independent contractor status. Oregon's minimum wage law

recognizes that employees who receive commission payments must still earn at least the minimum wage. ORS 653.035(2). In previously decided cases, this forum has found that workers who were paid on commission were employees (not independent contractors) and were owed the minimum wage. *See, for example, In the Matter of U.S. Telecom International*, 13 BOLI 114, 121-22 (1994). Likewise, the administrative rules governing private employment agencies recognize that employees are often paid on a commission basis. *See* OAR 839-17-376(1) (requiring the licensee to keep employment records including the "rate of pay and/or rate of commission" for all employees).

I conclude that, to a large degree, Claimant's opportunity for "profit" was determined by Respondent. This shows an economic dependence by Claimant on Respondent's business and indicates an employee-employer relationship.

(4) The skill and initiative required in performing the job

The recruiter job required a certain amount of skill and training. However, as with Claimant, Respondent often hired employees who had no education, training, or experience as recruiters. Then she trained them, with varying degrees of success. Many recruiter duties were clerical in nature, such as filing, typing, greeting clients, filling out forms, and taking phone messages. The job did not require any specialized skills that suggest the job was one performed by independent contractors.

While initiative was required to be a successful recruiter, I cannot find that the recruiter job required any more initiative than other commission-paying jobs. A great variety of commission-only jobs are performed by workers in an employment relationship. It is noteworthy that the Agency's survey of other employment agencies in the Eugene area showed that none of them used independent contractor recruiters. Likewise, it is notable that Claimant was hired to do the same job as other recruiters whom Respondent hired as employees. There is nothing about Claimant's commission-

only job that suggests, as a matter of economic reality, that she was not economically dependent upon Respondent's business. The skill and initiative required of Claimant in performing her job indicate an employee-employer relationship.

(5) The permanency of the relationship

Claimant was hired for an indefinite period. No evidence suggests that Respondent hired Claimant for a temporary, limited period. Claimant worked for nearly four months, until Respondent terminated the relationship. These facts indicate employee status.

Conclusion

Considering each factor of the economic reality test, I conclude that Claimant was economically dependent upon Respondent's business. She was not licensed or bonded as an employment agency, as the law would have required her to be if she were an independent contractor, and she was not eligible to be licensed. *See* ORS 658.035(3)(e) (to be eligible for a license, an individual must have "a minimum of one year's experience with an employment agency"). She was not free to work as a recruiter for others, pursuant to her noncompete agreement with Respondent. She had to work solely for Respondent. She was not in business for herself; she was dependent upon her employment in Respondent's business. Accordingly, as a matter of law, she was an employee and not an independent contractor.

Although Respondent may have intended to hire Claimant as an independent contractor and labeled one of her documents "COMMISSIONED INDEPENDENT CONTRACTOR," this was clearly insufficient to create that legal relationship.[5] An employer's intentions and how she labels a worker do not determine whether the worker is an employee or an independent contractor. It is by applying the economic reality test that we determine the worker's status. Applying the test in this case reveals that

Claimant was an employee.

HOURS WORKED

As part of her claim for wages, Claimant filled out calendar forms for the Agency to show the number of hours she worked. She later modified her claimed hours. Based on these calendars and Claimant's credible testimony, the forum has concluded that she was employed and was improperly compensated. Where the forum concludes that a employee was employed and was improperly compensated, it becomes the burden of the employer to produce all appropriate records to prove the precise amounts involved.[6]

Thus, it became Respondent's burden to produce all appropriate records to prove the precise amounts involved. ORS 653.045 requires an employer to maintain payroll records. Respondent did not maintain any record of hours or dates worked by Claimant. Respondent presented testimony that Claimant ate meals and took care of personal matters (such as paying her bills) while at work. She also presented testimony that claimant had doctors appointments and took a family member to medical appointments occasionally during working hours. However, without records or more specific evidence, the forum has no way of knowing when Claimant left work or for how long.

Where an employer produces no records, the Commissioner may rely on the evidence produced by the Agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate."[7] Based on these rulings, the forum may rely on the evidence produced by the Agency regarding the number of hours worked by Claimant. The evidence showed that Claimant worked for 450 hours for Respondent.

Respondent also contended that, until around April 15, 1996, Claimant was in

training. While Respondent never specifically claimed that this training time was not compensable work time, the law is clear that training time, as it occurred here, is compensable work time. *See* OAR 839-20-044; *In the Matter of Dan's Ukiah Service,* 8 BOLI 96, 106 (1989). Thus, the time Claimant spent training as a recruiter was compensable work time.

MINIMUM WAGES DUE

Respondent contends that her compensation agreement with Claimant was for a commission rate only, that Claimant earned no commission, and, therefore, that Respondent owes Claimant nothing. However, ORS 653.055(2) states that "[a]ny agreement between an employee and an employer to work at less than the wage rate required by [the minimum wage law] is no defense to an action under subsection (1) of this section." Likewise, ORS 652.360 states that "[n]o employer may by special contract or any other means exempt the employer from any provision of or liability or penalty imposed by ORS 652.310 to 652.414 or by any statute relating to the payment of wages[.]" In other words, an employer may not make an agreement with an employee whereby the employer is not required to comply with the minimum wage law or the wage collection law. The commission agreement between Respondent and Claimant is no defense to a failure to pay the minimum wage or a failure to pay final wages when due.

ORS 653.025 prohibits employers from paying their employees at a rate less than $4.75 for each hour of work time. ORS 653.035(2) provides that,

> "Employers may include commission payments to employees as part of the applicable minimum wage for any pay period in which the combined wage and commission earnings of the employee will comply with ORS 653.010 to 653.261. In any pay period where the combined wage and commission payments to the employee do not add up to the applicable minimum wage under ORS 653.010 to 653.261, the employer shall pay the minimum rate as prescribed in ORS 653.010 to 653.261."

Likewise, OAR 839-20-010 provides:

> "(1) Employees shall be paid no less than the applicable minimum wage for all hours worked, which includes 'work time' as defined in ORS 653.010(12). If in any pay period the combined wages of the employee are less than the applicable minimum wage, the employer shall pay, in addition to sums already earned, no less than the difference between the amounts earned and the minimum wage as prescribed by the appropriate statute or administrative rule.
>
> "(2) Employers may include commission and bonus payments to employees when computing the minimum wage. Such commission or bonus payment may only be credited toward employees' minimum wages in the pay periods in which they are earned."

ORS 653.055(1) provides in pertinent part that "[a]ny employer who pays an employee less than the [minimum wage] is liable to the employee affected: (a) For the full amount of the wages, less any amount actually paid to the employee by the employer[.]"

It is undisputed that Respondent paid Claimant nothing. Since no commission payments were earned and thus did not add up to the applicable minimum wage, Respondent was legally required to pay Claimant the minimum wage during the wage claim period. Therefore, Respondent owes Claimant unpaid minimum wages in the amount of $2,137.52.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders FRANCES E. BRISTOW to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following: a certified check payable to the Bureau of Labor and Industries IN TRUST FOR JEANNE MARIE KRAMER in the amount of TWO THOUSAND ONE HUNDRED THIRTY SEVEN DOLLARS and FIFTY TWO CENTS ($2,137.52), less appropriate lawful deductions, representing gross earned, unpaid, due, and payable wages, plus interest at the rate of nine percent per year on the sum of $2,137.52 from July 1, 1996, until paid.

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[1]Near the end of her employment with Respondent, Claimant brought her own typewriter into the office because it had a bold feature she wanted to use. Respondent did not require her to use or bring in her own typewriter. Also around that same time, Claimant used her own 10-key calculator at work.

[2]Generally, Claimant took a one-hour lunch break and the office was closed between noon and 1 p.m. each day.

[3]This is the same test used by federal courts when applying the Fair Labor Standards Act. *See Circle C Investments, Inc.*, 998 F2d 324 (5th Cir 1993).

[4]There was disputed evidence about whether Claimant bought a computer table used in Respondent's office. Claimant testified that, while she produced the cash to pay for the desk, the money was a loan to Respondent, who didn't have money at the time the desk was purchased. Even if I were to find that Claimant bought the desk for the office (which I do not find), the conclusion that Respondent had a vastly greater investment than Claimant would be the same.

[5]Incongruously, Respondent also labeled this same document "EMPLOYMENT AGREEMENT."

[6]*Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946); *In the Matter of Dan's Ukiah Service,* 8 BOLI 96, 106 (1989).

[7]*Anderson v. Mt. Clemens Pottery Co.*, 328 US at 687-88.