

An appeal

- by -

Klaus Orleans operating as Porpoise Harbour Cedar Products
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Irene G. Peters

FILE No.: 2000/557

DATE OF HEARING: December 6, 2000

DATE OF DECISION: January 10, 2001

DECISION

APPEARANCES:

Appellant	Klaus Orleans
Complainant	Laurent Prevost
Witness	Yvon Goupil

OVERVIEW

This is an appeal by the employer, pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) on July 26, 2000, which determined that Laurent Prevost (“Prevost”) was an employee of Klaus Orleans, operating as “Porpoise Harbour Cedar Products” (“Orleans”), and as such Prevost was employed by Orleans in the month of July, 1999, and as a result, was owed \$3,087.12 in outstanding wages and interest.

The delegate's findings and conclusions can be summarized as follows:

Prevost worked as a faller logger in July 1999, on a private woodlot owned by one Paul Garry (“Garry”). The trees were to be moved to market by a tugboat. The tugboat was owned by Klaus Orleans, operating as “Porpoise Harbour Cedar Products”. Orleans’ position was that he did not employ Prevost; rather Prevost was an employee of one Yvon Goupil (“Goupil”) and that the deal was that Orleans’ boat would get 60% of earnings and Goupil would receive 40%. Orleans says it was up to Goupil to pay Prevost. All agreed that Prevost had received no wages for his labour. The only individual that received any money in the operation was Orleans who received a cheque from Garry in the amount of \$3,500.00. Garry says that Orleans hired Prevost to do the falling and bucking, and Prevost was there throughout the logging operation. Prevost’s evidence was that he was hired by Orleans and that the agreed rate of pay was \$20.00 per cubic metre for wood logged. The delegate found that Orleans had negotiated the terms of the contract and was the only person who received any payment and, further, that the evidence indicated that Orleans was responsible for the employment of Prevost and exercised control over his activity. Orleans had failed to produce any employer records, despite the issue of a formal demand to do so, and he failed to produce any other requested documents related to the logging operation. Based on Prevost's evidence and the lack of any contrary evidence from Orleans with respect to method of payment, the delegate determined that the \$20.00 per cubic metre rate was the agreed-to rate of pay.

ISSUE(S) TO BE DECIDED

Did the delegate err in fact in finding that Prevost was an employee of Klaus Orleans operating as Porpoise Harbour Cedar Products and thus err in the Determination that Orleans had contravened Section 17(1), 40(2) and 58(1) of the Act in ordering Orleans to pay Prevost the amount of \$3,087.12?

FACTS

The key issue here, on appeal, is whether Prevost was an employee of Orleans. Orleans did not submit any new factual information at the appeal hearing to support the allegation of the error of fact of the delegate. In summary, the following submissions were made by Orleans:

1. Goupil and Garry made the initial arrangements. The contract existed between these parties. Orleans has nothing to do with this or any other contract with or involving Garry.
2. Orleans had a verbal contract with Goupil concerning the lease of his boat, the “Kaïen Princess”. Orleans received 60% of the revenue generated by the boat. The deal was that Goupil would solicit work and then hire labour as he deemed necessary, and this was solely Goupil's responsibility.
3. Prevost was not an employee of Orleans, nor did Orleans exercise any control over the work of Prevost or of Prevost. Orleans says Prevost worked as an independent contractor on a piecework basis for Goupil. Orleans advises he did not control his hours of work or the method by which the work was accomplished.
4. Goupil did speak with the delegate of the Director and Goupil did acknowledge that he made a verbal contract with Prevost and, lastly, neither Orleans or his company made any employment arrangement with Prevost.

ANALYSIS

This appeal was based on an alleged error of fact and, as a result, an oral hearing was conducted. I heard from Mr. Orleans, whose arguments I have summarized above. I then heard from Mr. Goupil, who added very little to the substance of what he told the delegate. Mr. Prevost did ask some questions of both Goupil and Orleans, but did not, in essence, add more to his position than what the delegate had initially considered.

The burden rests with the appellant to present evidence and argument, which casts doubt on the findings made in the Determination. In essence, Orleans and Goupil restated the facts that were given to the delegate. Goupil did elaborate on the issue of payment, and he did submit a letter, dated July 12, 2000, outlining the terms of the contract between him and Orleans. Goupil also stated that he had sole responsibility for any employees that worked on the tug.

Goupil's evidence was that he hired Prevost on a percentage basis. Goupil said that the contract was a percentage share of the net profit and that was standard practice for any kind of boat operation in this area. Goupil did not state that the deal was Prevost would receive 10% of earnings less his share of fuel costs. This was a discrepancy from the evidence given to the delegate. Goupil said in his oral evidence that he might have said that Prevost's profit could be as high as \$20.00 per cubic metre.

I am not convinced that the Determination contained any error on the issue of the delegate's findings that Orleans did employ Prevost. I did not find Goupil's evidence convincing and, in fact, it contradicted the evidence given to the delegate on the point of not mentioning the alleged 10% of earning less the share of fuel cost. I did not find anything helpful in Goupil's elaboration of the alleged contract between himself and Prevost. On a review of the evidence in it's entirety, including the evidence submitted at the oral hearing, I find the delegate's findings of fact are supported by the evidence, and that there was no new evidence that would undermine the delegate's findings of fact. For these reasons then, I find that Orleans has not met the burden placed on him as an appellant.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination be confirmed.

IRENE G. PETERS

**Irene G. Peters
Adjudicator
Employment Standards Tribunal**