

An appeal

- by -

Darlene F. Grey o/a Roadrunner Courier
("Grey")

- 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: David B. Stevenson

FILE No.: 2003A/321

DATE OF DECISION: February 25, 2004

DECISION

SUBMISSIONS

Darlene F. Grey	on her own behalf
Allison Crawford	on her own behalf
Richard Saunders	on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Darlene F. Grey operating as Roadrunner Courier (“Grey”) of a Determination that was issued on November 21, 2003 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Grey had contravened Part 3, Section 18, Part 5, Section 45 and Part 7, Section 58 of the *Act* in respect of the employment of Allison Crawford (“Crawford”) and ordered Grey to cease contravening and to comply with the *Act* and to pay Crawford an amount of \$2,712.52.

The Director also imposed an administrative penalty on Grey under Section 29(1) of the *Employment Standards Regulation* (the “Regulations”) in the amount of \$5,500.00. The total amount of the Determination is \$8,212.52.

The grounds of appeal are that the Director erred in law by finding Crawford was an employee under the *Act* and that new evidence has come available that was not available at the time the Determination was made.

Grey has requested an oral hearing on the appeal, indicating she wishes to draw the attention of the Tribunal to “numerous cases which have determined, in circumstances virtually identical to the present, that courier drivers are independant [sic] contractors and not employees”. Generally, the Tribunal will not hold an oral hearing on an appeal unless the case involves a serious question of credibility on one or more key issues or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly (see *D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards)* [2001] B.C.J. No. 1142 (B.C.S.C.)).

After considering the Determination, the appeal and the material on file, the Tribunal decided an oral hearing was not necessary in order to adjudicate the appeal.

ISSUE

The issue in this appeal is whether the Director erred in law in concluding Crawford was an employee for the purposes of the *Act*.

THE FACTS

Grey operates a courier delivery service. Crawford was employed by Grey as a driver from December 2, 2002 to March 14, 2003 and was paid by way of commission on each pick up and delivery made by her. Crawford complained that Grey had failed to pay all wages owed, including the amount of an NSF cheque, annual vacation and statutory holiday pay, and that she should be reimbursed for gas and cel phone costs incurred by her while working for Grey.

The Determination and the material on the record set out the following sequence of events relating to the administration of the complaint:

- The complaint was received by the Director on April 14, 2003.
- On July 17, 2003, the Director sent a Notice of Mediation to Grey by registered mail. Canada Post confirmed that cards were left for Grey to pick up the item, but it was not picked up.
- The mediation was scheduled for July 23, 2003. Grey did not attend.
- On August 6, 2003, the Director sent a Notice of Hearing and Demand for Employer Records to Grey by registered mail. Canada Post confirmed that a card was left for Grey to pick up the item, but it was not picked up.
- No records were delivered to the Director.
- The hearing was set for August 27, 2003, commencing at 9:00 am.
- On August 8, 2003, the Director sent an amended Notice of Hearing and Demand for Employer Records to Grey by registered mail. Canada Post confirmed that a card was left for Grey to pick up the item, but it was not picked up.
- The hearing was rescheduled for August 28, 2003, commencing at 9:00 am
- Neither Grey, nor anyone on her behalf, appeared at the hearing.
- A delegate called Grey's office on August 28, 2003 and was told by "Michael", from dispatch, that Grey had been rushed to the hospital the night before. "Michael" stated he did not know how long Grey would be unavailable.
- The Director conducted the hearing and received information from Crawford relating to her claim.
- On October 28, 2003, the Director sent a letter to Grey by registered mail containing the allegations made by Crawford and the information provided at the hearing.
- On November 12, 2003, the Director received a fax communication over the signature of Grey. The communication stated, among other things, that Grey had been on sick leave since July, 2003. The communication submitted that Crawford was a self employed contractor and attached copy of the contract between Grey and Crawford.

On November 21, 2003, the Determination was issued. The Determination sets out the following on the issue of whether Crawford was an employee for the purposes of the *Act* or was an independent contractor:

In general, the degree to which the party who pays for the service provided controls the supply of material and tools and retains direction and control of the activities, increases the likelihood that the Director will find the relationship to be one of employer/employee.

In this case, the employer provided no evidence to support her claim that Crawford was a contractor, despite repeated attempts to obtain her information on this complaint.

Part of the evidence provided by Grey, was a copy of Crawford's employment contract with Roadrunner. Under her contract, and according to the evidence supplied by Crawford, she was required to be available for dispatch by Roadrunner, and she was required to provide one week's notice in advance of any proposed absence. She was dispatched through Roadrunner's dispatch service; she used Roadrunner's way bills when picking up or delivering to her clients; clients paid Roadrunner, who then paid Crawford a commission based on the charge to the client. Grey set the rate of pay, the method of payment, and the timing of payment. There was no risk of loss or chance of profit as Crawford was paid a set commission of her work. The employer's business is courier deliveries. Therefore, Crawford's work was integrated into the business and the business totally relied on her and on other drivers to make the pick-ups and deliveries.

The employment contract shows that Grey controlled and directed Crawford when she worked for Roadrunner.

In result, the Director found Crawford was an employee and was owed wages, including annual vacation and statutory holiday pay. Based on the information provided by Crawford and received from Grey, the Director concluded Crawford was owed wages, including annual vacation and statutory holiday pay, in the amount of \$2,712.52 including interest. The director denied the claim for gas and cel phone costs.

In reaching the conclusion that Crawford was an employee, the Director referred to the definitions of employee and employer in the *Act* and some of the factors found in the traditional common law tests.

ARGUMENT AND ANALYSIS

The burden is on Grey, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

112.(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

(a) the director erred in law:

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was made.

Grey says the Director erred in law in finding Crawford was an employee and there is evidence available that was not available at the time the Determination was made.

The grounds of appeal raised in this appeal have been analyzed in identical circumstances in *Darlene F. Grey operating Roadrunner Courier*, BC EST #D025/04.

In that decision the Tribunal did not consider that Grey had shown there was any “*evidence . . . that was not available at the time the determination was made*” which met the criteria the Tribunal applies to information sought to be introduced on an appeal under this ground. The result in this case is no different. Some of the information provided under this ground is not relevant to the material issue under appeal, which is the conclusion that Crawford was an employee. Other information that has been included in this appeal is not properly evidence and, in any event, was information which was reasonably available to Grey and could have been presented to the Director during the investigation. Also, based on the conclusion on the alleged error of law, the information provided would not have led the Director to a different conclusion on Crawford’s status under the *Act*.

On the alleged error of law, the Tribunal found that for the purposes of the *Act*, the overriding test is whether the individual “*performed work normally performed by an employee*” or “*performed work for another*”, that common law tests for determining the relationship are subordinate to the statutory definition read against the purposes and objectives of the *Act*, that the Director is not compelled to follow court decisions that were not decided under the *Act* and that, consequently, the Director had not erred in law by not reaching the same result as courts and other tribunals had reached in cases addressing the employment status of couriers.

This appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated November 21, 2003 be confirmed in the amount of \$8,212.52, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal