

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

Addco Drywall Limited

(“Addco”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/082

DATE OF DECISION: March 29, 1996

DECISION

OVERVIEW

This is an appeal by Addco Drywall Limited (“Addco”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. CDET 000605 issued by the Director of Employment Standards (the “Director”) on January 2nd, 1996. The Director determined that Richard Honaizer (“Honaizer”) and Robert Norwood (“Norwood”) were employees of Addco and, as employees, were entitled to be paid overtime and vacation pay pursuant to sections 40 and 58, respectively, of the Act. The total amount payable pursuant to the Determination is \$507.02 including interest.

Addco maintains that both Honaizer and Norwood were retained on a fee for service basis as independent contractors and, accordingly, are not entitled to overtime and vacation pay under the Act. The sole question before me is the employment status of Honaizer and Norwood inasmuch as Addco does not challenge, in its Appeal, the specific overtime and vacation pay calculations upon which the Determination is based.

In my opinion, there was ample evidence to support the Director’s finding that both Honaizer and Norwood were employees.

FACTS

Honaizer was first engaged by Addco on or about September 13th, 1995 and was discharged on or about October 13th, 1995. It is not clear from the material before me when Norwood was first engaged or when he was terminated by Addco although the Director found that Norwood worked for Addco from September 25th to October 6th, 1995. The period of service of either Honaizer or Norwood is not in dispute. Both Honaizer and Norwood were told that they would be paid (and in fact were paid) on the basis of \$1 (one dollar) per linear foot of steel studding that they installed (this piece work payment scheme worked out to be \$18 per hour).

While both Honaizer and Norwood provided some of their own equipment, the more complex and expensive equipment that they utilized in their work was provided by Addco. They were directed, at the work site, by Addco personnel, in

particular a foreman named “Kevin”. All necessary building materials were provided by Addco. Honaizer and Norwood were paid on a “straight-time basis” for all of their hours worked. Addco cheques were issued on the basis of invoices that were submitted by Honaizer and Norwood; both Honaizer and Norwood were instructed by Addco as to how to prepare the invoices.

ISSUE TO BE DECIDED

Were Honaizer and Norwood “employees” or “independent contractors”?

ANALYSIS

Although it may have been the intent of Addco to create an “independent contractor” relationship with each of Honaizer and Norwood, I am satisfied that they both were employees as defined in the Act. Therefore both were entitled to overtime and vacation pay as ordered by the Director.

I now turn to the Act, and in particular, to certain statutory definitions that are relevant to the question of whether or not Honaizer and Norwood were engaged by Addco as employees or independent contractors.

An “employee” is defined in section 1 of the Act as including “a person...receiving or entitled to wages for work performed for another...” or “a person an employer allows, directly or indirectly, to perform work normally performed by an employee...”. “Employer” is defined in section 1 as including a person “who has or had control or direction of an employee”. Finally, “wages” are also defined in section 1 of the Act as including, *inter alia*, “salaries, commissions or money, paid or payable by an employer to an employee for work” and “money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency”.

Addco exercised direction and control over Honaizer and Norwood and thus Addco was an “employer” under the Act. The work that was performed by Honaizer and Norwood was of the sort that would normally be performed by employees of a drywall contractor. Further, both Honaizer and Norwood received “wages” from Addco as their compensation was based on their production and efficiency (namely, their payment by Addco based as determined by the “\$1 per linear foot” formula).

Although it is not necessary to do so, I would parenthetically add that in my opinion, both Honaizer and Norwood can also be characterized as employees under the well-known common law “four-factor” test. In this latter regard, I would adopt the reasons set out by the employment standards officer in the Reasons Schedule attached to the Director’s Determination.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 000605 be confirmed in the amount of \$507.02.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal