

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, C. 113

- By -

Valley Janitor Supplies Ltd.
("Valley" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

AJUDICATOR:	Ib S. Petersen
FILE NO.:	98/658
DATE OF HEARING:	February 2, 1999
DATE OF DECISION:	March 5, 1999

“employee” includes

- (a) person ... receiving or entitled to wages for work performed for another;
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee ...”

An “employer” is also defined in the *Act*:

“employer” includes a person

- (a) who has or had control or direction of an employee; and
- (b) who is or was responsible, directly or indirectly, for the employment of an employee.

First, it is well established that these definitions are to be given a broad and liberal interpretation. Second, my interpretation must take into account the purposes of the *Act*. The Tribunal has on many occasions confirmed the remedial nature of the *Act*. It is well established that the basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (see, for example, *Machtiger v. HOJ Industries Ltd.*, <1992> 1 S.C.R. 986). As well, Section 4 of the *Act* specifically provides that an agreement to waive any of the requirements is of no effect.

Section 2 provides:

2. The purposes of this Act are as follows:

- (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
- (b) to promote the fair treatment of employees and employers;
- (c) to encourage open communication between employers and employees;
- (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;

(e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;

(f) to contribute in assisting employees to meet work and family responsibilities.

The following from the Tribunal's decision in *Knight Piesold Ltd.*, BCEST #D093/99, at pages 4-6, is useful:

"Deciding whether a person is an employee or not often involve complicated issues of fact. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and "integration" (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and *Christie et al. Employment Law in Canada* (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, <1947> 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of "whose business is it".

...

... As noted in *Christie et al.*, above, at page 2.1-2.2 with respect to the common law tests of "employee" status:

"In each of these contexts the purpose of characterizing a relationship as employment is quite different from the purpose of the characterization in the action for wrongful dismissal, the traditional common law action in which the two-party relationship that is the subject of this service is elaborated, to say nothing of the purpose of particular statutes in which the term may appear. ... It follows that precedents arising under common law or under a particular statute can be legitimately rejected or modified when the question of "employee" status is asked for a different purpose."

With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. ...”

Considering the whole of the relationship between the parties in light of the statute, Gillespie was an employee of Valley.

Pohoreski testified that he came to know Gillespie in 1991 through a church they both attended. Mr. Ronald Stokalko, who testified on behalf of Valley, supported that testimony. Gillespie, in any event, did not disagree that he came to know Pohoreski at that time. Pohoreski explained that he and his wife became friends with Gillespie and his wife. Around 1993, Gillespie’s employer--at the time--ran into financial difficulties and Gillespie took over some equipment in lieu of payment of wages and started Mel’s Machine Shop. Pohoreski contended that Gillespie continued to operate his business. In 1995, Pohoreski testified, Gillespie’s business ran into difficulties and Pohoreski suggested that he move into Valley’s premises with his equipment to share space, rent, utilities and other costs. Pohoreski explained that he and Gillespie were working together on producing pressure washing tools. It is common ground that Gillespie moved into Valley’s premises with his equipment and that he brought his own employee, Howie, to work with him at Valley (until Howie was terminated in October 1995). The fact that Gillespie worked with his own tools and equipment is, in my view, not by itself sufficient to exclude him from the protection of the *Act*. While the relationship between the parties may have not started out as an employment relationship it turned into one, at least from November 1995.

First, Gillespie agreed that he was the former principal behind Mel’s Machine Shop Ltd. but explained that the company was sold and did not carry on business while he worked for Valley. The evidence supported that. As well, Gillespie explained that Howie’s employment was terminated in October, shortly after the move into Valley’s premises, at the direction of Pohoreski. On balance, I do not accept Valley’s contention that Gillespie’s business continued.

Second, Gillespie explained that he was hired by Valley to develop new window washing equipment for Valley. He did not--and this is not disputed--invoice Valley for this work. Materials used for this equipment was purchased for and invoiced to Valley. As well, other services provided by Valley through Gillespie to other customers were also invoiced through Valley. Ms. Brocklesby, of Civic Tool & Die Works Ltd., an occasional customer of--and supplier to--Valley, and who testified for Gillespie, said that Pohoreski referred to Gillespie as follows: “he is not my partner, he is just an employee”. In cross-examination, she agreed that she had become a personal friend of Gillespie.

Third, Gillespie stated that he was earning regular wages. He stated that his wage entitlement was \$2,500 per month. There was evidence that Valley made substantial payments to Gillespie.

At the hearing, Pohoreski explained that he cashed cheques for Gillespie and made payments as follows to Gillespie:

•	November 10/95 cashed P&R Fleet Service cheque		
	\$840		
•	Mel	\$275	
	Howie	\$500	\$775
•	November 16, cashed cheque		
	\$1,100		
•	Mel	\$500	
	Howie	\$700	\$1200
•	November 20, cashed cheque		
	\$1930		
•	Mel	\$500	\$500
•	December 1 Mel	\$350	
•	December 29 Mel	\$850	\$1,200
•	January/96 oil sales	\$831.40 (less)	
•	January 17 Mel	\$300	
•	January 31 Mel	\$1,500	\$1,800
•	February oil sales	\$79.60 (less)	
•	March oil sales	\$220.00 (less)	
•	March 1 Mel	\$1,500	
•	April sales	\$800.62 (less)	
•	April 1 Mel	\$1,674.32	
•	April 24 Mel	\$300	\$1,974.32
•	May sales	\$194.15 (less)	
•	May 1 Mel	\$1,700	
•	May 15 Mel	\$500	
•	May 22 Mel	\$700	
•	May 27 Mel	\$165	\$2,065
•	June sales	\$270 (less)	
•	June 1 Mel	\$850	
•	June 7 Mel	\$500	
•	June 28 Mel	\$1,000	\$2,350
•	July Mel	\$542	
•	July 31 Mel	\$1,000	\$1,542
•	August 13 Mel	\$550	
•	August 19 Mel	\$575	\$1,125
•	September 16 Mel	\$550	\$550
•	October 1 Mel	\$1,000	
•	October 20 Mel	\$550	\$1,550
•	November 1 Mel	\$1,000	
•	November 29 Mel	\$1,550	\$2,550

The cheques were not produced. However, it does not appear that there was any dispute over the fact that the payments were made. The Employer suggested that it made payments to “help out “ Gillespie and his wife who were facing financial difficulties. However, in the circumstances, and on the balance of probabilities, I find it difficult to accept that these substantial payments were made for that purpose. Not only are the payments substantial, and more than occasional, they occur with some degree of regularity, usually at least twice a month. In my view, it is more probable that the payments were made to Gillespie because the relationship had developed into an employment relationship.

The first time that amount \$2,500 per month is mentioned between the parties is March 1996. On March 5, 1996, the Employer wrote a letter on its letterhead:

“Valley Janitor Supplies has been in business for 43 years marketing janitorial supplies in the Fraser Valley. Melvin was hired in September of 1995 for our machine production department. He is a key machinist for our company developing our new product line of window washing equipment. His base salary is \$2,500.00 per month plus production bonuses. He is a very good employee and has a secure future with our company.”

Gillespie stated that there was a meeting between himself, his wife, Pohoreski and his wife around the time he moved into Valley’s premises--or shortly thereafter--in October 1995. At that meeting, he explained, he told Pohoreski that he needed at least \$1,550 per month (net) to make ends meet. He indicated that Pohoreski was agreeable to that and stated that “he would (then) be an employee”. Pohoreski denied that this meeting occurred. Moreover, while Valley paid money to Gillespie, the amounts and time of payment were not as regular as claimed.

Valley explained that the March 5, 1996 letter was written solely to assist Gillespie to obtain a mortgage and did not indicate the true state of affairs in the relationship between itself and Gillespie. Pohoreski explained that he had written it at the behest of Gillespie and his wife who had put pressure on him to write the letter to assist them in obtaining a mortgage. Gillespie agreed that the letter was written in order to assist him and his then wife to obtain a mortgage. However, the letter was produced in minutes and without any pressure on their part. In fact, he stated, Pohoreski had no hesitation in providing the letter to him. He agrees with the \$2,500 set out in the letter. This was arrived at by Pohoreski who said that with tax, U.I., C.P.P his \$1,550 per month would be “up to \$2,500 anyway”. In my view, this indicates that the parties had not reached a firm agreement with respect to that amount of compensation until--at the earliest--March 1996. Gillespie’s understanding from the October 1995 meeting was that he would receive \$1550 net per month.

Pohoreski testified that in December 1996, Gillespie's equipment was picked up by the latter's creditors who had a security interest in the equipment. On December 11, 1996, Pohoreski posted a letter for Gillespie:

“Regarding you and your company renting shop space from Valley Janitor Supplies Ltd. You and your company have reneged on your rent from October 1995 to Dec. 1996 a total of fifteen months at \$1,200.00 per month. You have also reneged on your portion of taxes, hydro, gas, telephone and secretarial use for a total of \$500.00 per month. The total indebtedness at \$1,700.00 per month is \$25,000.00 We hereby demand full payment on this outstanding account. If this account is not cleared by certified cheque or bank draft by 10:00 a.m. Thursday, December 12, 1996, all remaining assets of Mel's Machine Shop or Melvin Gillespie will be seized and sold at Valley Janitor Supplies discretion and furthermore if Melvin Gillespie or his representatives enter upon the property of Valley Janitor Supplies after 10:00 a.m. Thursday December 12, 1996 they will be charged with trespassing.”

I do not accept that the relationship between Valley and Gillespie was business relationship. The fact that the relationship between the two was not reduced to writing is not determinative. There is generally no requirement that a contract be in writing. I prefer the evidence of Gillespie to the effect that there was no such business relationship. If, in fact, that had been the case, I would have expected Valley demand payment of the money paid to Gillespie during the approximately one year. Valley provided no reason why it did not demand payment of amounts paid which, there was no employment relationship, must have been advanced or paid on some other basis.

I am satisfied that Valley terminated Gillespie's employment when it denied him access to the premises on or about December 11, 1996. In the result, Gillespie is entitled to compensation for length of service under the *Act* (Section 63).

Valley bears the burden of showing that the Determination is wrong. In my view, Valley has not satisfied that burden. In the result, the appeal is dismissed.

ORDER

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

Ib Skov Petersen
Adjudicator