

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 -

Eagle Alloys Ltd.
("Eagle Alloys")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 1999/681

DATE OF HEARING: January 21, 2000

DATE OF DECISION: February 4, 2000

DECISION

APPEARANCES:

Darrell Elmquist, Director & Officer	for Eagle Alloys Ltd.
Robert Macdonald	on his own behalf
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Eagle Alloys Ltd. (“Eagle Alloys”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 21st, 1999 under file number ER 094-754 (the “Determination”).

The Director’s delegate determined that Eagle Alloys owed its former employee, Robert Macdonald (“Macdonald”), the sum of \$2,250.06 on account of unpaid wages and interest. This latter figure was based on the minimum wage provided for in the *Regulation* and Macdonald’s records of hours worked. In addition, by way of the Determination, the Director also levied a \$0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation* by reason of Eagle Alloys’ failure to pay Macdonald at least the minimum wage for all hours worked (see section 16 of the *Act*).

This appeal was heard at the Tribunal’s offices in Vancouver on January 21st, 2000 at which time I heard the evidence and submissions of Darrell Elmquist, an officer and director of Eagle Alloys, on that firm’s behalf, and of Robert Macdonald on his own behalf. The Director was not represented at the appeal hearing but did submit a written submission prior to the hearing which I have also considered.

ISSUE TO BE DECIDED

Eagle Alloys asserts that the delegate did not have any jurisdiction to issue the Determination because Macdonald was an “independent sales agent” and not an employee as defined in section 1 of the *Act*.

FACTS AND ANALYSIS

Eagle Alloys is headquartered in Edmonton, Alberta; the firm sells welding products. To that end, Macdonald was engaged in November 1998 to sell the firm’s products in the greater Vancouver area. Unfortunately for all concerned, Macdonald was not able to generate sufficient sales and, since his remuneration was commission-based, Macdonald resigned his position in late February 1999.

As noted above, the issue is whether or not Macdonald was engaged by Eagle Alloys as an employee or an independent contractor. In my view, the delegate correctly determined that the relationship between the parties was that of employer-employee.

The evidence before me clearly shows that Macdonald devoted his entire energies to the sale of Eagle Alloys' products. Since Eagle Alloys did not have, in late 1998 or early 1999, an established foothold in the lower mainland market, Macdonald's efforts resulted in relatively few sales. Nevertheless, during his tenure with Eagle Alloys, Macdonald devoted his time exclusively to Eagle Alloys. Macdonald received direction from, and reported to, Eagle Alloys on a regular basis. For example, he reported to the Edmonton office by telephone on a weekly basis and submitted daily "call reports" to the Edmonton office. Macdonald was held out by Eagle Alloys as their employee--for example, he was given business cards that identified him as an Eagle Alloys representative and was also provided with all of the trappings of an employed sales representative such as product samples, catalogues, product literature, order and price books and so forth, all of which were supplied to Macdonald by Eagle Alloys at the outset of their relationship. Eagle Alloys reimbursed Macdonald for his employment related expenses.

In all respects, Macdonald performed the sort of services that employed sales representatives typically undertake on their employer's behalf. Indeed, Elmquist's evidence is that Macdonald would have been made a "regular" employee if his 3-month probationary period had been more successful. Other than signing a formal employment contract, it does not appear that Macdonald's duties would have markedly changed had he successfully completed his probation period and been offered "regular" employment. It may well have been Eagle Alloys' *intention* to create an independent contractor relationship, however, the *substance* of the parties' relationship was clearly employer-employee.

The facts of this case are not markedly dissimilar from those in any number of cases where commissioned sales representatives, nominally engaged as "contractors", were held by the Tribunal to be "employees" for purposes of the *Act* based on the substance of the parties' relationship--e.g., *Bennett*, B.C.E.S.T. Decision No. 338/96; *B.J. Heatsavers Glass and Sunrooms Inc.*, B.C.E.S.T. Decision No. 137/97. Our courts have taken the same approach when determining a person's status: see e.g., *Macdonald v. Richardson Greenshields of Canada* (1985), 69 B.C.L.R. 58 (B.C.S.C.).

While Eagle Alloys takes issue with the number of hours Macdonald claimed to have worked during the relevant period, I do not find Macdonald's evidence on this matter to be anything other than credible. Eagle Alloys, for its part, has not submitted any concrete evidence that would call into question Macdonald's records as to the number of hours he worked.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$2,250.06** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, as and from the date of issuance.

In light of the foregoing, it follows that the \$0 penalty is also confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal