EMPLOYMENT STANDARDS TRIBUNAL

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

Employment Standards Act S.B.C. 1995, C. 38

- by -

Eurosport Auto Company Ltd.
("Eurosport")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/558

DATE OF HEARING: **January 21, 1997**

DATE OF DECISION: **January 31, 1997**

DECISION

APPEARANCES

Fredrick Hwang	on behalf of Eurosport Auto Co. Ltd.
James S. D. Garrow	on his own behalf
Jennifer Ip	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Eurosport Auto Company Ltd. ("Eurosport"), under Section 112 of the *Employment Standards Act* (the *"Act"*), against Determination No. CDET 003985 which was issued by a delegate of the Director of Employment Standards on September 13, 1996. The Determination finds Eurosport owes $394.12 to James S. D. Garrow ("Garrow") for unpaid wages ($210.00); statutory holiday pay ($54.34); vacation pay ($120.57) plus interest accrued to September 13, 1996 ($9.20).

Eurosport asserts in its reasons for the appeal that Garrow was not an employee of Eurosport and that he made false statements about his wage rate and hours worked.

A hearing was held on January 21, 997 at which evidence was given under oath by Fredrick Hwang (President, Eurosport Auto), Brian Martin (Bodyshop Manager) and James Garrow.

ISSUES TO BE DECIDED

Was Garrow an employee of Eurosport Auto ? If so, what wages are owed to Garrow ?

FACTS AND EVIDENCE

The "Calculation and Reason Schedule" attached to the Determination sets out, in detail, the issues and facts on which the Director's delegate relied to make the following findings:

1. I have concluded that the complaint was an employee of Eurosport.

2. The reasons are as follows:

> a) Eurosport is a bodyshop. The work performed by the complainant was an integral part of the company's business;

b) The complainant was under the direction and supervision of Eurosport in performing his work;

c) The complainant had no financial investment in the company; and

d) Eurosport allowed the complainant to perform his work on the company premises.

3. I have concluded that the complainant's total earnings during his period of employment were $2,960.00. In making the decision, I have relied on the information provided by the complainant as Eurosport has not kept proper payroll records.

4. I have concluded that the complainant is owed statutory holiday pay for April 5 (Good Friday) as he had been employed with Eurosport for 30 calendar days prior to the statutory holiday.

The Determination also shows that the Director's delegate relied on the following points:

- Eurosport put a stop payment on a cheque ($216.00) which it issued to Garrow on May 3, 1996.

- Garrow's earnings for the period March 2, 1996 to May 4, 1996 totaled $2,960.00 of which $2,750.00 was paid in cash.

- Garrow was not paid vacation pay (contrary to Section 58 of *Act*).

Fredrick Hwang ("Hwang") gave evidence at the hearing. He stated that Garrow was paid in cash because Garrow preferred it. He also testified the he "... assumed Garrow had his own company."

Hwang submitted into evidence a copy of an invoice from Pacific Press to Eurosport concerning the publication of an advertisement in *The Vancouver Sun*. The advertisement for an "experienced bodyperson" appeared in the newspaper on 1996 March 6, 7, 8, 9, 10.

Hwang also testified that the first work he gave to Garrow was to repair a black Honda. According to Hwang's oral evidence, Garrow was paid $20.00 per hour for that work.

Hwang states in a letter (dated September 5, 1996) to the Director's delegate:

> "About the first week of April, I gave him a 4-hour job on a black Honda Civic for his first to show his skill. He asked for $80.00 cash. I gave him $90.00 cash and expected him to give me $10.00 change but he didn't."

Hwang also testified that Garrow performed repairs on two other vehicles (Porsche; VW Corrado) which were not satisfactory. According to Hwang's oral evidence Garrow was to be paid a "flat rate" for repairing each vehicle.

With respect to his decision to place a stop payment order on the cheque issued to Garrow on May 3, 1996 Hwang stated that there were two reasons for doing so: the repairs performed by Garrow were unsatisfactory; and, Garrow owed Eurosport approximately $300.00 for mechanical work performed on his personal car.

Garrow gave evidence that he began working for Eurosport on March 2, 1996 following an interview with Hwang. He testified that he did not respond to a newspaper advertisement and did not arrange an interview by telephone. Garrow stated that he went to Eurosport because he had "heard rumors" from others in the trade that Eurosport required autobody repairers as a result of former employees leaving to start their own autobody business.

Garrow's oral evidence, which was not challenged by Hwang, was that he did not have his own business, he used his own tools but he did not supply any parts or shop supplies and he did not "rent space" from Eurosport.

ANALYSIS

There is a conflict between the evidence given by Hwang and Garrow. My task is to weigh and consider all the evidence I have received and to make a finding of fact. The following excerpt from the BC Court of Appeal's decision *in Farnya v. Chorny* sets out how issues of credibility must be resolved:

> "*The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions.* ***In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions***. . ." (my emphasis)
> *(Farnya v. Chorny* (1952) 2 D.L.R. 354, B.C.C.A.,)

In this case I have concluded that I must prefer the evidence given by Garrow whenever it conflicts with that of Hwang. Garrow's evidence was consistent with the probabilities, but Hwang's was not.

I accept the copy of the Pacific Press invoice as proof that Eurosport advertised for "experienced bodypersons" between March 6 and 10, 1996. However, I am unable to conclude that the start date of Garrow's employment with Eurosport can be determined by the dates of which the newspaper advertisement was published. Garrow's evidence on this point was no challenged by Hwang. I therefore find it more probable that Garrow's employment began on March 2, 1996.

Was Garrow an Employee ?

The law with respect to when an individual is an independent contractor, as opposed to an employee, was set out by the Tribunal in a recent decision, *Larry Leuven*, (BCEST (1996) #D136/96):

> Section 1 of the *Act* contains the following definitions:
>
> **"employee" includes:**
>
> (a) a person, including a deceased 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,
>
> (c) a person being trained by an employer for the employer's business,
>
> (d) a person on leave from an employer, and
>
> (e) a person who has a right of recall;
>
> **"employer" includes a person:**
>
> (a) who has or had control or direction of an employee, or
>
> (b) who is or was responsible, directly or indirectly, for the employment of an employee;
>
> **"work"** means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
>
> (2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

These definitions must be given a liberal interpretation according to the BC Court of Appeal [*Fenton v. Forensic Psychiatric Services Commission* (1991)56 BCLR (2d) 170].

It is these statutory definitions that I am required to interpret and apply to the facts of this appeal. [*Yellow Cab Ltd. v. Board of Industrial Relations* (1992) 114 DLR(3d) 427(SCC)]. However, there are several factors which have developed in the common law that assist the decision-making process. These factors include the following:

- Control by the employer over the work;
- ownership of tools;
- chance of profit/risk of loss;
- remuneration of staff;
- discipline/dismissal/hiring;
- perception of the relationship;
- intention of the parties; and
- integration into the employer's business.

The BC Supreme Court has noted that:

> The courts, in determining the nature of a labour relationship, have looked beyond the language used by the parties in the contract and have, instead, assessed the nature of their daily relationship

[*Castlegar Taxi v. Director of Employment Standards* (1988) 58 BCLR (2d) 341]

In the *Castlegar Taxi* case, Mr. Justice Josephson referred to the following passage from a decision of the BC Labour Relations Board:

> The difficulty is that there is no single element in the normal makeup of an employee which is decisive, and which would tell us exactly what point of similarity is the one which counts. Normally, these various elements all go together but is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee...But while the legal conception of an employee can be stretched a fair distance, ultimately there must be some

> limits. It cannot encompass individuals who are in every respect essentially independent of the supposed employer.
>
> [*Hospital Employee's Union v. Cranbrook and District Hospital* (1975) 1 C.L.R.B.R. 42] ": (at pp. 5-7)

When I consider the evidence in this case I make the following findings:

- **Control by the employer over the work**

  Hwang assigned Garrow to work and controlled the way he did it. If the work performed by Garrow was not satisfactory would be told so by Hwang or the paint department employees or the bodyshop manager.

- **Ownership of tools**

  Garrow owned his own tools which he used while working for Eurosport.

- **Chance of profit/risk of loss**

  Garrow was paid an hourly rateor a "flate rate". There was no chance of profit or risk of loss.

- **Intention of the parties**

  The parties were not in agreement on the nature of the relationship.

- **Integration into the employer's business**

  Garrow was fully integrated into Eurosport's business. There were several other employees in the bodyshop, according to Hwang's oral evidence, and Garrow's work was an integral part of the work performed by those other employees.

For all of the above reasons I find that Garrow was an employee for purposes of the *Act*.

What wages are owed to Garrow ?

The Determination shows that Garrow is owed $384.92 in wages plus interest payable pursuant to Section 88 of the Act. There was no evidence which challenged the accuracy of the calculations made by the Director's delegate. Therefore, I have no reason to vary the Determination.

ORDER

I order, under Section 115 of the *Act*, that Determination NO. CDET 003985 be confirmed.

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Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sr