

An appeal

- by -

Therese Azarraga

- and by -

EDA Industries Corp.
("EDA")

- 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: Carol L. Roberts

FILE No.: 2001/771 and 2001/775

DATE OF HEARING: January 23, 2002

DATE OF DECISION: January 30, 2002

DECISION

APPEARANCES:

On behalf of EDA Industries Corp.: V. Jaberansari

On her own behalf: T. Azarraga

OVERVIEW

This is an appeal by EDA Industries Corp. ("EDA"), and by Therese Azarraga, pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued October 15, 2001. The Director found that EDA had contravened sections 17, 18, 45 and 58 of the Act in failing to pay Therese Azarraga wages, statutory holiday pay, and annual vacation pay, and Ordered that EDA pay \$8,517.34 to the Director on Ms. Azarraga's behalf.

ISSUE TO BE DECIDED

Whether the Director erred in determining that Ms. Azarraga was an employee, and if so, whether she was entitled to wages, holiday pay, and annual vacation pay in the amount determined by the Director.

FACTS

EDA is a wholesale company engaged in the sale and distribution of pet toys and supplies, and cat litter.

EDA was originally operated as a sole proprietorship by Ms. Azarraga's husband, Ehren. In January 1999, Mr. Azarraga sold one half of his interest in the business to Vaheed Jaberansari. EDA was incorporated as a company that month, with Mr. Azarraga and Mr. Jaberansari as its Director/Officers. The business continued operations in Port Coquitlam until the end of January 2001, when the company was to relocate its office to Toronto. Mr. and Ms. Azarraga were also to relocate in Toronto, but did not. There was a falling out between Mr. Azarraga and Mr. Jaberansari, and they are currently in a dispute over, among other things, missing inventory and improper use of funds.

Ms. Azarraga filed a complaint with the Employment Standards Branch contending that she worked from January 1999 to May 2001 as the office manager, at a rate of \$2500.00 per month.

After reviewing the evidence of the parties, and interviewing Mr. Azarraga, the delegate concluded, on a balance of probabilities, that Ms. Azarraga was an employee of EDA. He found

that Ms. Azarraga did perform work an employee would normally perform, that EDA had control over her work, and that the work relationship was consistent with a relationship of employer /employee.

In the absence of any payroll records, employment contract or pay advice slips, the delegate analyzed the evidence of the parties, and concluded that Ms. Azarraga was entitled to be paid for 10 hours of work per week at the minimum wage for the period January 31, 1999 to January 31, 2001, plus vacation pay. The delegate concluded that Ms. Azarraga did not work on any statutory holidays, and calculated her statutory holiday pay based on s. 24(b) of the Regulation.

ARGUMENT

Both parties appeal the Determination.

EDA argues that the delegate erred in determining the facts. Mr. Jaberansari argued that Ms. Azarraga was not an employee, because he did not "allow" her to work as an employee, and that any work performed was performed on behalf of her husband, not EDA. He contends that Ms. Azarraga's documentation is fraudulent, and her statements, lies. He further argues that her claim was filed only after he made certain demands of Mr. Azarraga, and that, had the claim been valid, it would have been made long before it was.

Mr. Jaberansari further contends that he was denied an opportunity to respond to the investigation, claiming that he only had one short phone conversation with the delegate, and that, when his legal counsel sought the production of documents, he did not get any reply.

Ms. Azarraga contends that the delegate erred in not finding that she was a full time employee with a salary of \$2500.00 per month.

The Director disputes Mr. Jaberansari's contention that he was not given an opportunity to reply to the complaint. The delegate says that all documents filed by Ms. Azarraga were forwarded to his counsel, and that he had two subsequent telephone conversations with his counsel and one with his accountant. He states that a letter was sent to Mr. Jaberansari in July, and there was a further exchange of documents with his accountant. Finally, the delegate says there was a meeting of the delegate and EDA lawyers in September to further discuss the complaint.

The Director acknowledges the documents provided by Ms. Azarraga, but contends that they do not substantiate her claim that she worked the number of hours per day she alleges, or that they support her argument that she was employed full time.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has not been met by either party.

Section 1 of the Act defines employee to include

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

An employer is defined as including 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 is defined as meaning "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."

Mr. Jaberansari's arguments in support of his position repeat those both he and his counsel made to the delegate. His view is that the claim is motivated by bad faith on Ms. Azarraga's part, and that all the documents are fraudulent.

Mr. Jaberansari's arguments were analyzed by the delegate, and I am unable to find that he erred in his findings of fact or conclusions. The overriding test in determining whether an employer/employee relationship exists is whether Ms. Azarraga "performed work normally performed by an employee," or "performed work for another." The Tribunal has held that the definition is to be broadly interpreted: (*On Line Film Services Ltd v Director of Employment Standards BCEST #D319/97*).

Mr. Jaberansari did not dispute that some work was done by Ms. Azarraga for EDA's benefit. Both parties agreed that some office work was necessary, such as receptionist services, filing, mailing, banking, shipping and receiving, and bookkeeping. The evidence is employees were hired from time to time to perform those services, but did not stay. I am unable to accept Mr. Jaberansari's argument that Mr. Azarraga was to perform all that work himself. It is not disputed that Mr. Azarraga travelled with Mr. Jaberansari on company business from time to time, and it would clearly be impossible for Mr. Azarraga to perform office duties during these times. Further, Mr. Jaberansari also conceded that Ms. Azarraga performed work, although he contended that her efforts were to be credited to her husband's shareholder loan account, since she worked for him, not EDA.

I am unable to conclude that the delegate erred in finding that Ms. Azarraga was an employee. EDA is a distinct legal entity. Ms. Azarraga performed work for the benefit of EDA. She provided evidence from other employees who acknowledged her position as office manager. She was not a director of the company, and did not agree to have her wages credited towards her husband's shareholder account. She is entitled to be paid for the work she performed.

There is no evidence supporting Mr. Jaberansari's position that he was not given an opportunity to respond to the complaint. I find that the delegate had many conversation with EDA's counsel and accountant, and that EDA was given an opportunity to reply to the complaint. The evidence is that EDA's counsel did provide a lengthy response on August 29, 2001.

With respect to Ms. Azarraga's arguments, there is no new evidence supporting her position that the delegate erred in finding that she was not a full time employee. Her documentation supports her claim that she performed some work. However, I find her argument that she worked 8 hours per day incredible. Her own records, for example, contain the following notations:

1/11/99: container delivery of pet supplies
1/13/99: Canadian Waste delivery of garbage bin
3/2/99: correspondence with contact management
4/26/99: Bank deposit slip
4/27/99: Bank deposit slip
10/28/00: Received unloading report from Port Jersey logistics
1/17/01: confirmed delivery schedule for 71128
11/08/00: Bank deposit slip, phoned w/o to find out if container has arrived.

This is not the schedule of a full time employee.

Furthermore, Ms. Azarraga presented no evidence to dispute the delegate's comments that, while investigating a complaint by another employee of EDA, he went to the offices on three occasions in May and June of 1999, and Ms. Azarraga was not present. Ms. Azarraga also provided no response to the delegate's comments that her claim reflected full time wages for 4 months after the Port Coquitlam office closed. Having regard to Ms. Azarraga's schedule, I am unable to find the delegate's conclusion is perverse.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated October 15, 2001 be confirmed, together with whatever interest may have accrued since that date, pursuant to section 88 of the Act.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal