

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-

Gary Fitzpatrick and Allan Ledger/Ken Cowery dba Westwind Taxi Company
("Westwind")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO: 1998/823

DATE OF DECISION: February 19, 1999

DECISION

This is a decision based on written submissions by Gary Fitzpatrick and D. LeQuesne.

OVERVIEW

This is an appeal by Gary Fitzpatrick and Allen Ledger/Ken Cowery dba Westwind Taxi Company ("Westwind"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued December 4, 1998. The Director found that Westwind failed to pay David LeQuesne ("LeQuesne") compensation for length of service, annual vacation pay, statutory holiday pay and overtime wages, and Ordered that Westwind pay \$2217.26 to the Director on behalf of LeQuesne.

ISSUE TO BE DECIDED

Whether the Director correctly determined that LeQuesne was an employee, whether vacation and statutory holiday pay was owed, and whether LeQuesne was terminated for cause.

FACTS

LeQuesne drove a taxi for Westwind Taxi on an "on call" basis for Westwind from May 1996 until January 5, 1998. Payment was on a 50/50 split commission. On January 6, 1998, LeQuesne was hired directly by Fitzpatrick, the owner/operator of Taxi #13, and worked for him until he filed an application for compensation to the Worker's Compensation Board on March 11, 1998. When he presented himself to work after his medical payments ceased, his employment was terminated. Fitzpatrick paid LeQuesne one weeks pay in lieu of notice.

The Director's delegate determined that even though Fitzpatrick argued that LeQuesne was treated as an independent contractor at LeQuesne's request, there was an employer/employee relationship between Westwind Taxi and LeQuesne as well as between Fitzpatrick and LeQuesne. He reviewed an opinion by Revenue Canada which found an employer/employee relationship existed throughout the association, and that Fitzpatrick was in arrears of CPP payments on behalf of LeQuesne.

He further determined that Westwind and Fitzpatrick were mutually and separately liable for payment as associated companies under Section 95 of the *Act*. Having determined that Fitzpatrick was the successor company to Westwind, the Director's delegate found that LeQuesne was entitled to two week's compensation based on length of employment.

LeQuesne's claim for overtime wages was dismissed, as the Director's delegate found insufficient evidence to support this claim.

The Director's delegate also determined that LeQuesne was entitled to vacation pay and statutory holiday pay, which he stated that Westwind and Fitzpatrick had not turned their mind to, since they had not contemplated that an employer/employee relationship existed between them. The Director's delegate found that an agreement to regard the relationship as one "for service" was contrary to the *Act*, and that the protection of the *Act* could not be waived.

A claim for a miscellaneous payment of \$182.00 was dismissed as it found to be beyond the jurisdiction of the *Act*.

ARGUMENT

Fitzpatrick argued that he and LeQuesne had a verbal agreement regarding the method of payment. He contended that LeQuesne was offered an hourly wage, but after some thought, elected for a 45% commission because he felt it would be more lucrative, especially after deductions from the salary were taken into consideration. Fitzpatrick contended that the commission included holiday pay.

Fitzpatrick argued, as I understand his submission, that LeQuesne was not treated as an employee at his own request, and therefore that compensation for length of service, vacation pay and statutory holiday pay were not owing.

ANALYSIS

Section 95 of the *Act* provides that if the Director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,

- (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and
- (b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

There was no evidence presented to convince me that the relationship between Fitzpatrick and LeQuesne should be regarded as anything but an employer/employee. Fitzpatrick's argument was reviewed by the Director's delegate, who determined that an employer/employee relationship existed, in part based on a ruling by Revenue Canada. That ruling was not appealed.

The arguments presented on appeal appear to be the same as those presented to the Director's delegate, which does not support the grounds of appeal that the Determination is in error. I note, in any event, that Fitzpatrick acknowledged LeQuesne's status as an employee when he paid him one week's wages when he was terminated.

Fitzpatrick contends that at the time LeQuesne was hired from Westwind, he agreed that there would be no claims or disputes against Westwind. As the Director's delegate indicated, Section 4 of the *Act* establishes certain minimum requirements which parties cannot contract out of.

It states that

The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

In other words, LeQuesne was not in a position to waive any rights to compensation in lieu of notice, and I dismiss this ground of appeal.

With respect to the issue of vacation pay and statutory holiday pay, Fitzpatrick contends that an allowance ought to be made for his belief that LeQuesne was not an employee. He argued that his payment scheme exceeded the minimum standards and benefits as set by the *Act*.

The Director's delegate has no discretion whether to apply the *Act* or not. Once the employment relationship is determined to fall within the *Act*, an employee is entitled to the benefits established by it. The Director's delegate determined the wages owing based on the criteria established by the *Act*, and there was no evidence submitted to suggest that the calculations were in error.

The appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated December 4, 1998 be confirmed in the amount of \$2217.26, together with whatever further interest that may have accrued, pursuant to Section 88 of the Act, since the date of issuance.

Carol Roberts
Adjudicator
Employment Standards Tribunal