

An appeal

- by -

Key Fund Raising Ltd.
("Key")

- 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: April Katz

FILE No.: 2000/699

DATE OF DECISION: February 14, 2001

DECISION

SUBMISSIONS:

Toni-Marie Catchpaw on behalf Key Fund Raising Ltd.
Martin Godbout on his own behalf
Janice McNary on behalf of the Director

OVERVIEW

The Appellant, Key Fund Raising Ltd., (“Key”), a fund raising company, has appealed a Determination which found that it owed a canvasser, Martin Godbout (“Godbout”) \$464.56 in wages, statutory holiday pay and vacation pay. Canvassers work for commission. Key’s appeal is based on the position that a canvasser works for a crew manager who is an independent contractor. The crew manager is not an employee and therefore the staff of the crew manager are not Key’s employees.

Key disputes it could owe Godbout for time worked when there was no record of donations received. Key does not accept that a canvasser would work a shift without receiving donations from which a commission would be calculated.

Finally Key submits that if Godbout was an employee, his work shifts did not entitle him to statutory holiday pay.

ISSUE

1. Did the Director err in concluding that Godbout was Key’s employee within the meaning of the Employment Standards Act (Act)?
2. Did the Director err in concluding that Godbout was entitled to statutory holiday pay for May 24, 1999 (\$30.35), July 1, 1999 (\$1.91), September 6, 1999(\$9.41) and October 11, 1999(\$4.08)?
3. Did the Director err in finding Godbout was owed wages and vacation pay?

ARGUMENT

Key disputes several of the findings in the Determination, which supported the conclusion that Godbout was an employee.

- (a) Key argues that Godbout was an independent contractor employed by a crew manager who had a contract with Key. Key relies in part on the language of the contract for canvassers which specifies that a canvasser is an independent contractor. Key argues that if was an employee that Godbout was the crew manager’s employee and not Key’s employee. Key states that the crew manager was an independent contractor with Key.

They point out that the crew manager placed the advertisement in the paper to which Godbout responded.

- (b) Key argues that it did not specify how Godbout should act. The charity provided a script and identification for each canvasser. Key states that it did not have a dress code.
- (c) Key argued that it did not set Godbout's rate of pay. Key agreed to pay the crew manager 50% of the donations and it was up to the crew manager to decide how to split that with the canvasser. The industry standard is 35% to the canvasser.
- (d) Key argues that it does not have a policy and procedure manual to direct how Godbout could canvass. The contract with Godbout simply specified that Godbout "wear respectable and appropriate attire when canvassing and . . . conduct himself in a professional and courteous manner."
- (e) Key argues that the company only provided clipboards and donation record sheets. The charity supplied identification cards, charitable receipt books and pamphlets.
- (f) Key disputes the finding that Godbout could work a shift and receive no income. Key argues that Godbout is not entitled to minimum wage for the 5 days he is claiming where the company has no evidence of earnings on that day.

Key also argues that because Godbout had not worked for 3 months before the statutory holidays and did not work shifts before and after the statutory holidays he was not entitled to compensation for the statutory holidays.

Godbout argues that he was Key's employee. He points out that he responded to an advertisement placed in the paper by Key. He entered into a written contract with Key as the named other party to the contract. He refers to Key's document, Exhibit 7 page 13, which sets out Key's policies and procedures. He cites the sections of the contract which set out the dress requirements. Godbout points out that the materials Key supplied were all that he needed to do the work.

With respect to the statutory holidays Godbout suggests it is a matter for statutory interpretation.

Godbout offers the details of those he worked with and where he canvassed on the days he was not paid because there were no donations.

FACTS AND ANALYSIS

On April 1, 1999, Godbout executed a written contract of work with Key. Godbout most often worked four hour shifts. He worked one eight hour shift from April until his last day October 19, 1999. Most shifts were from 5 PM to 9 PM, Monday through Thursday.

The Director's Delegate found that he was an employee within the meaning of the Act. She applied the criteria of control, integration, economic reality and specific result.

The Director's Delegate found that the crew manager exercised control over the activities of Godbout. The crew manager told the canvassers where to meet. She decided which charities the canvassers would be solicited donations for. She allocated streets for canvassing. She provided the equipment and the scripts. The canvassers could decide which days to work but if a canvasser worked, the work was directed by the crew manager. The control of where and what was done was in the hands of the company supervisor, the crew manager.

The Director's Delegate found that Godbout's work was integral to Key's work of obtaining donations for the charities for which Key was contracted to fund raise.

The Director's Delegate found that Godbout was not independent of Key and could not go into business for himself. The Delegate found that the day-to-day work was prescribed by Key and that Godbout carried out the work that was requested of him. Key argued that Godbout could have set up his own team and developed his own territory. When Godbout tried to do that in 2000 Key rejected his proposal. It does not appear that Godbout could act independently as long as he was part of this crew manager's team.

The final criterion is whether the person is required to perform general work or specific work. Godbout's work on each shift was very specific and not of a general discretionary type.

The contract provided that the

“Corporation agrees to supply, on a daily basis, to the Independent Sub-Contractor all necessary material required by the Independent Sub-Contractor to perform the services of door-to-door canvasser. The materials to be, but not limited to, the following:

portfolio, pen, receipt book(s), donation record sheet and identification card”

Key agreed that they provided these materials but argued that some of the items came from the charity. Specifically the charities provided the script and identification cards. Key was retained to act as the representative of the charity. The canvassers were Key's agents. I do not find that it makes any difference where the particular items came from. Key supplied the materials in accord with their contract.

Godbout's earnings were based solely on a 35% commission from door to door donations. He met with other canvassers and his crew manager at a predetermined location for each shift.

Godbout had to keep track of his hours under the contract and did so in his diary. His script in the diary was extremely small and the Director's Delegate reviewed it and decided it could not be read if it was photocopied. The hours and locations were interspersed with a great deal of other personal information in the diary. She found this information to be reliable.

Key provided Godbout with a script to use with each charity. The canvassers were expected to canvass the areas assigned and use the script provided.

Key did not dispute the elements of determining an employee in this appeal. Based on the findings I find that the Director did not err in concluding that Godbout was an employee within the meaning of the Act and Regulations.

Was Godbout an employee of the crew manager or Key's employee? The crew manager placed the advertisement in the paper using Key's name. The crew manager executed a contract with Godbout using Key's name. The crew manager was able to bind Key to contracts. The crew manager had ostensible authority to act as Key's representative.

The payroll records were supplied by Key. Key required Godbout to keep a record of his hours for Key. Key set the terms of employment. The salary sheets prescribed that Godbout be paid 35% of the commissions. If there was an employment relationship between the canvassers and the crew manager there was not evidence supplied to support that conclusion. I find that Godbout was Key's employee as provided in the written contract of employment.

Key submits that the Director's Delegate erred in the Determination when she included wages for statutory holidays.

Part 5 of the Act sets out when an employee must be paid for a statutory holiday.

Section 44, Entitlement to statutory holiday

44. *After 30 calendar days of employment, an employer must either*
- (a) give an employee a day off with pay on each statutory holiday, or*
 - (b) comply with section 46.*

Section 45, Statutory holiday pay

45. *An employee who is given a day off on a statutory holiday or instead of a statutory holiday must be paid the following amount for the day off:*
- (a) if the employee has a regular schedule of hours and the employee has worked or earned wages for at least 15 of the last 30 days before the statutory holiday, the same amount as if the employee had worked regular hours on the day off;*
 - (b) in any other case, an amount calculated in accordance with the regulations.*

Section 46, If employee is required to work on statutory holiday

46. *(1) An employee who works on a statutory holiday must be paid for that day*

- (a) *1 1/2 times the employee's regular wage for the time worked up to 11 hours, and*
 - (b) *double the employee's regular wage for any time worked over 11 hours.*
- (2) *In addition, the employer must give the employee a working day off with pay according to section 45.*
- (3) *The employee may choose to have the pay for the day off credited to the employee's time bank, if one has been established.*
- (4) *The employer must schedule the day off with pay*
- (a) *before the employee's annual vacation,*
 - (b) *before the date the employment terminates, or*
 - (c) *if the pay for the day off is credited to the employee's time bank, within 6 months after the date of the statutory holiday, whichever is earliest.*

Section 47, If statutory holiday falls on a day off

47. *If a statutory holiday falls on a non-working day for an employee, section 46 (2) to (4) applies.*

Section 24 of the Regulations B.C. Reg 396/95 provides the following direction on calculating statutory holiday pay for persons who do not work regularly.

For the purposes of section 45(b) of the Act, statutory holiday pay is calculated as follows:

- (a) *For an employee who does not have regular schedule of hours and who has worked at least 15 of the last 30 days before a statutory holiday, by dividing the employee's total wages, excluding overtime wages, for the 30 day period by the number of days worked;*
- (b) *For an employee who has worked less than 15 of the last 30 days before a statutory holiday, by dividing the employee's total wages, excluding overtime wages, for the 30 day period by 15.*

Based on this formula the Delegate found that Godbout had worked for 30 days prior to May 24, 1999 and that he was entitled to statutory holiday pay. He worked for 14 days in April, 18 days in May, 1 day in June, no days in July, 4 days in August, 2 days in September and 1 day in October. Based on this information the Delegate calculated that Godbout was entitled to the following for each of the statutory holidays during his employment, May 24, 1999, \$30.35, July 1, 1999, \$1.91, September 6, 1999, \$9.41 and October 11, 1999, \$4.08 for a total of **\$45.74**.

Key's argument was based on legislative criteria from another jurisdiction, which does not apply. Based on the Act, Godbout is entitled to the wages calculated in the Determination for statutory holidays.

The final issue relates to the days Godbout claims he was at work and received no pay. The crew manager paid Godbout and the other canvassers by cheque every day at the end of a shift based on the donations each had secured. Godbout kept detailed records of every shift he worked. He could provide the Delegate with the details of where he worked and with whom he worked on each crew. He had the detail of the number of hours he worked. The Delegate accepted this information in calculating the wages owed.

Key's appeal is based on the belief that a canvasser could not perform a whole shift without receiving money. There was no evidence to support this belief. The onus is on the appellant to prove the appeal. There is no evidence here to disturb the Delegates findings. I therefore accept that Godbout is entitled to pay for the hours worked without compensation.

The Act is very clear that employees are entitled to 4% holiday pay for the hours worked. There is no evidence from Key which would deny Godbout's statutory entitlement under Part 7 section 58 of the Act.

CONCLUSION

Based on the evidence before me I find that Godbout was properly characterized as an "employee" and there is no evidence to support an error in the Determination. I deny the appeal and confirm the Determination.

ORDER

Pursuant to section 115 of the Act, I order that the Determination in this matter, dated September 15, 2000 be confirmed.

April D. Katz

April D. Katz
Adjudicator
Employment Standards Tribunal