

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 -

Joe Hirak
(" Hirak ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE No.: 1999/741

DATE OF HEARING: February 11, 2000

DATE OF DECISION: April 6, 2000

DECISION

APPEARANCES:

Joe Hiram	on his own behalf
Nancy Hiram	on behalf of Joe Hiram
Brad Everett	on behalf of Joe Hiram
Walter Hiram	on behalf of Joe Hiram
Floyd Joseph	on his own behalf

no appearance on behalf of the Director

OVERVIEW

This is an appeal by Joe Hiram (“Hiram”) under Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination dated November 10, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). Hiram alleges that the delegate of the Director erred in the Determination by concluding that Floyd Joseph (“Joseph”) was an employee and entitled to wages and compensation for length of service in the total amount of \$10, 036.03 (includes interest).

ISSUES

The issues to be decided in this appeal are:

1. Was Joseph an employee or an independent contractor ?

If Joseph is found to be an employee, are wages owed ?

FACTS

Joe Hiram testified and stated that:

- he doesn’t have a business, it was just a bunch of us decided to go to work and try to make some money placer mining for gold;
- he owns a mining claim;
- the year prior (1997) he needed a mechanic;
- he met Joseph at that time and took him out to the work site to do some repairs;
- the following year (1998) Joseph came out to the work site and knew that there would be no

wages paid as all had agreed to work for a percentage of the gold recovered;

- at no time was the matter of wages discussed with Joseph;
- all of us out there took the same gamble and the same risks;
- we lost our shirts;
- he was in charge of the safety issues as the claim is in his name;
- there was a problem as Joseph would not lay off the pot;
- eventually we got together and decided that Joseph was not doing any good so he left;
- disagree with the records provided by Joseph to the delegate of the Director, feel those records were fabricated after the fact;
- a lot of the work Joseph listed was done by others;
- don't understand why this hearing is taking place, Joseph got his share of the gold (8%);
- Joseph sold his own gold to Al Zubrecki ("Zubrecki") who operates Landau Ventures Ltd.;
- he doesn't own the loader or the cat so he is not responsible for any work done on the loader or cat;
- if Joseph was an employee, why did he have to bring out his own food and supplies;
- he doesn't understand why Joseph stayed around so long if he felt he was not being paid properly with the percentage.

In response to cross examination by Joseph, Hiram stated:

- he is the part owner of the wash plant and the generator;
- Joseph moved the wash plant from the special lease to Manson Creek;
- Joseph did the hookups to the generating plant for the pumps etc.;
- in the mornings, Joseph and Jim Rogers ("Rogers:") started up all of the equipment, the hoe, loader, bobcat, blue cat, etc.;
- he owns the welder which was on the truck brought up by Harold McFeeters ("McFeeters");
- he supplied the welding rods for the welder;
- the fuel for the equipment was paid for by those who owned the equipment, that's why they had the share they did;
- McFeeters was supposed to be at the hearing but is currently working in the bush;
- he does not remember the date that Joseph sold gold to Zubrecki;
- his father (Walter Hiram) helps out on the claim from time to time;
- there was never anyone in charge, except for the mine regulations etc. as Hiram's name is on the claim;
- he worked at his fathers business (pizza shop) when not mining but he was not paid for that work.

In response to questions from the Panel, Hiram stated:

- when he needed a mechanic in 1997, he had his wife post advertisements for a mechanic;
- he had no money to pay an employee, Joseph wanted to go on percentage like the others;
- the inconsistencies in the information provided to the delegate of the Director were because Hiram believed that the delegate of the Director was talking about the previous year (1997) when Joseph had come out for 2 or 3 weeks;

- he is the owner of the lease and has the necessary permits in his name;
- he pays rent on the lease;
- he is the responsible person for the safety issues;
- Hirak Holdings Ltd. is solely owned by his father although he (Hirak) does use that name from time to time in business dealings;
- in 1998, Joseph got paid his 8%;
- Joseph could have gotten paid for the 1 job and then gone home but he (Joseph) wanted to stay and work on a percentage;
- McFeeters is a good worker and an honest man.

Walter Hirak (W. Hirak”) testified that:

- the time he was up at the mine site, it was more like a party with not much serious mining going on;
- he mentioned his concerns to Joe Hirak;
- he was concerned that they would be smoking pot on the loader and he told them it was not appropriate;
- as he understood it, everyone brought their own food etc.;
- as he understood it, everyone got a percentage of any gold found;
- he spoke to Zubrecki who said that there was some gold coming out and as soon as it’s out of the ground he would pay for it;
- he doesn’t remember if he saw Joseph smoking pot;
- they would leave in the morning and go to see one of the nearby residents who mentioned to him (W. Hirak) that they would have a “pot party”;
- he was concerned that it was interfering with the operation for gold;
- everyone was in agreement to bring their own food etc. as they were all partners;
- he did not hear from anyone that someone was being paid by the hour;
- when Joseph and Rogers left the claim, they did not ask for wages;
- he has done some placer mining since 1981 and has an idea of what should be happening at the mine site;
- he was involved on a percentage basis as it was his loader that was being used;
- his percentage was 5%;
- he did not push for his 5% as he was not able to get his loader going as it should have.

In response to cross examination by Joseph, W. Hirak stated:

- he had lots of experience in placer mining;
- he had no previous dealings with Zubrecki;
- he talked to Zubrecki about percentages here in Prince George when he (Zubrecki) asked if they had found any gold;
- the nearest bathroom to the claim was at Manson Creek;
- his name was not mentioned to the delegate of the Director as being involved as he couldn’t get his loader going;
- he asked Joseph to work on the loader as he was available;

- Hirak Holdings Ltd. has nothing to do with placer mining;
- he doesn't know why Hirak Holdings Ltd. was listed on the job postings as the employer;
- he did not know that the job posting had gone up listing Hirak Holdings Ltd. as the employer;
- he gave instructions to Joseph as to what work to do when Hirak was in town;
- Hirak Holdings Ltd. owned a pizza shop at that point in time;
- Hirak worked at the pizza shop and, like everyone else who worked there, he was paid.

In response to questions from the panel, W. Hirak stated:

- he was not aware that the mechanic's job had been posted listing Hirak Holdings Ltd. as the employer.

Brad Everett ("Everett") testified that:

- everyone was working on a percentage basis;
- he called Hirak one day to see if he could go and operate the hoe and Hirak gave him a percentage;
- everyone had access to the "black book" where Hirak kept records of the gold recovered and the percentages being paid;
- he and Joseph smoked pot while out at the mine site;
- when he and Joseph would leave the mine site and go to visit the individual at Manson Creek they would smoke pot and get high;
- Joseph stopped smoking pot around the crew after his wife found out;
- Joseph was gone shortly after that happened.

In response to cross examination by Joseph, Everett stated:

- he knew Rogers who was there helping out Mike Hirak;
- he knew Rogers got a percentage from what Mike Hirak got paid;
- when Hirak told him he would get paid a percentage, it was coming out of the percentage share that Hirak was getting;
- he started at the mine site on May 1, 1998;
- his job was to help Hirak out;
- he doesn't know why, as he did not start at the mine site until May 1, 1998, that Hirak advised the delegate of the Director that he was one of the original 'partners' in this venture;
- when he was not working at the mine site (off season) he was employed at the pizza shop;
- he and Joseph would go 'hang around' the tire man's residence to avoid work;
- he recalls Joseph was fixing the equipment and training him (Everett);
- they did not punch a clock, the normal work day was from daylight until it was too dark to keep working unless they had to repair equipment under the lights;
- he reviewed the hours submitted by Joseph and agreed that was how long the days were;
- he would sometimes stop for lunch but not always with Joseph;
- he never kept track of his hours of work.

In response to questions from the panel, Everett stated:

- he is Hiram's brother-in-law;
- he was present when Joseph left, he left pretty much on his own;
- he was learning to be a Heavy Duty Mechanic;
- he would go to town to pick up parts as required;
- Hiram would provide a cheque for payment of the parts picked up;
- he was paid on a percentage basis, started at 3% and then up to 5%;
- he got cash from Zubrecki who would show up at the claim, assay the gold and then make a partial payment;
- he can't recall if he ever sold gold to Zubrecki in Prince George;
- he supplied his labour and his own food but did not supply any equipment;
- Joseph stayed in the same trailer as did he for part of the time;
- work was assigned by consensus during a meeting each morning;
- he saw W. Hiram come out to the mine site and work on his loader;
- he was at the mine site while McFeeters was there, he considers McFeeters as a 'straight shooter' and kind of liked him;
- he left the claim in August 1999 at the same time as Joseph;
- he was not fired by Hiram;
- there was a big argument and when he told Hiram to get out of the trailer, Hiram told them, (Everett, Joseph and Rogers) to get out so they did;
- there was no other discussion before they left the mine site;
- he later talked to Hiram and agreed to go back to the mine site;
- he does not recall contacting Joseph about returning to work at the mine site.

The hearing was recessed to permit the appearance of another witness, Nancy Hiram, who was delayed at a dental appointment.

After the hearing resumed, Nancy Hiram ("N. Hiram") testified that:

- as the spouse of Hiram, she was aware of the arrangements made for the payment to everyone on a percentage basis;
- everyone knew that this venture was being done on a joint basis;
- she was a friend of Joseph's wife until she told her that Joseph was smoking pot;
- she put up the advertisement for a mechanic in the fall of 1997;
- the advertisement was placed at the Prince George Job Shop and also with the HRDC office in Prince George;
- Joseph answered the advertisement and was taken out to the mine site;
- at the mine site, Joseph performed some work and they all became friends;
- Joseph wasn't doing much out at the mine site;
- the relationship with Joseph and his wife fell apart after she told Joseph's wife that he was smoking pot;
- she believes she was present on one occasion when she observed Everett and Joseph smoking pot in the trailer;

- there was never any discussion of being paid by an hourly rate;

In response to cross examination by Joseph, N. Hirak stated:

- she went out to the mine site to bring food supplies for Hirak and also picked up food from Joseph's wife for him;
- she was aware of the percentages being paid as she and Hirak discussed 'everything';
- she did not sell any of the gold to Zubrecki;
- she was not aware whether Everett sold gold to Zubrecki;
- the 'joint venture' involved Hirak and herself, Everett, McFeeters, Rogers, Mike Hirak, Joseph;
- she was aware that W. Hirak was also involved as he is involved in everything.

In response to questions from the panel, N. Hirak stated:

- McFeeters is a straight shooter;
- she was present at her home when Zubrecki bought some gold;
- she doesn't think any transactions were done at the mine site but possibly on one occasion a transaction took place in Vancouver;
- her understanding of the percentages to be paid were: Joseph - 8%, Rogers - 5%, Everett - 3% or 5%, M. Hirak - 25%, McFeeters - 25% with the balance to Hirak;
- she was not present when Hirak met with the delegate of the Director to discuss the allegations of Joseph's complaint.

Joseph testified that:

- he did not nor does he now smoke pot;
- his job was to repair all of the equipment;
- Hirak paid for all of the supplies and materials necessary to get the 'blue' wash plant going;
- in October 1997 Hirak said he would be paid a percentage but when he finally got paid in December it was not as much as he expected;
- when he went back to the mine site in March 1998 he began to keep a daily log of the work performed and the hours worked;
- once they had the "blue" wash plant operating, Hirak decided to use the other wash plant so it had to be moved to the mine site;
- they also had to set up the various 'ponds' as required;
- all of this work took a lot of time and he wasn't going to work for nothing;
- he never saw the 'back book' in which Hirak kept the records of the gold recovered and the percentages paid;
- the 'black book' was kept in Hirak's own trailer and they were all told that the trailer was off limits;
- they were told that anyone found near the sluice box by themselves or in Hirak's trailer would

be 'gone';

- the postings from the Job Shop and HRDC indicate that wages depended on experience and were to be negotiated;
- on the last day he worked Hiram told all of them (Everett, Rogers and Joseph) to get out;
- Hiram owned the wash plant, excavator, welder, generator and paid for the fuel and welding rods used;
- he was instructed by Hiram to work on all of the equipment as required;
- he did not agree to work on a 'joint venture', he applied for and was hired as a Heavy Duty Mechanic;
- he was assured by Hiram that he would be paid for all the work done before Joseph agreed to bring his tools out to the mine site;
- he never asked Hiram to sell the gold for him as the gold belonged to Hiram and he kept it locked in his trailer;
- he received a total of \$3,571.41 in payment for the work performed;
- he never sold any gold to Zubrecki as that was done by Hiram;
- the money was paid to him by Zubrecki at the request of Hiram;
- he did not raise any issue of wages owing to Hiram as he got his first pay in June 1998 for the work he started in March 1998;
- he was only claiming unpaid wages for the period March - August 1998 as he did not keep any records for the work performed in October - December 1997;
- they did not start to recover any gold in 1998 until sometime in May;
- the time from March - May 1998 was spent doing repairs and set up for the mining operation;
- he does not dispute that the agreed rate of pay was to be 8 % of whatever gold was found;
- Hiram had promised to provide the necessary food etc. but after a period of eating mostly canned food, he asked his wife to send up some additional groceries with Nancy Hiram;
- after he was told by Hiram to leave, he was contacted by Everett who asked him if he wanted to come back to work but he declined as he had already found other work;
- he filed his complaint because the money he received was less than minimum wage for the time worked.

In response to cross examination by Hiram, Joseph stated:

- he never smoked pot;
- he never saw the 'black book' with the percentages until this hearing;
- he was instructed by Hiram to perform maintenance work on McFeeter's cat;
- he never sold any gold to Zubrecki, that was all handled by Hiram.

Hiram supplied a letter from Mike Hiram which supports his position.

The delegate of the Director during the investigation spoke to Hiram, Joseph, Zubrecki, McFeeters, the Job Shop and HRDC. The Job Shop and HRDC confirmed that a posting for a Heavy Duty Mechanic was listed indicating that Hiram Holdings Ltd. was the employer with the wages to be either based on experience or to be negotiated.

During discussions with Hirak, the delegate of the Director was advised that Joseph did work for Hirak but only for a “few weeks”. Hirak further advised the delegate of the Director that Joseph did not do much except “smoke dope all day” and that was why Joseph was let go. During a subsequent meeting with Hirak, the delegate of the Director was told that Joseph was never employed by Hirak and that Joseph was in fact part of a ‘joint venture’ looking for gold. Hirak identified the participants in that ‘joint venture’ as himself, his brother Mike Hirak, his brother-in-law Everett and Joseph. Hirak further advised that Joseph agreed to receive a percentage of the gold found and sold that gold directly to Zubrecki. Hirak further advised that Joseph’s percentage was set at 8% as Joseph had only his skills as a mechanic to offer while the other partners supplied the equipment. Hirak finally advised that the reason Joseph was terminated was that he (Joseph) had been “found stealing gold”.

The delegate of the Director was advised by McFeeters that when he first began to work for Hirak it was on an hourly basis. McFeeters further advised that as time went on he began to be compensated on a percentage or share basis. McFeeters advised that Joseph was an employee who was compensated on a percentage basis. McFeeters observed Joseph working as a mechanic, welder and a general overall maintenance worker of a full time basis for almost 1 year. McFeeters finally confirmed that Joseph did not own any of the equipment that was worked on.

The delegate of the Director was advised by Zubrecki that the business of buying gold was done strictly with Hirak, Hirak would provide him with the placer gold and a written list of names/amount allocated to various persons. Zubrecki advised he would then issue a “receipt/invoice” indicating the gross and after melt weight of the gold and the value in the names of the individuals as instructed by Hirak. Those receipts would then be given to Hirak to be passed on to the individuals. Zubrecki advised that there may have been times that the balance of payments were sent directly to the addresses of the individuals on the list provided by Hirak.

The delegate of the Director determined that Joseph was an employee of Hirak and as such was owed wages as set forth in the Determination.

ANALYSIS

The burden of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, Hirak.

There is no dispute with respect to some of the basic facts in this matter. Joseph responded to advertisements from Hirak Holdings Ltd. for a Heavy Duty Mechanic and, around October 1997 began to perform work at a placer gold mine lease owned by Hirak. Joseph worked from October 1997 until the end of November or early December 1997 (the end of that season) and again from March 1998 until early August 1998. Joseph was paid on a percentage basis (8%) of the gold recovered. Joseph performed work involving the repair of equipment and other related duties. Joseph received a total of \$3,571.41 for work performed during the period March 29,

1998 to August 4, 1998.

There is however, dispute with respect as to whether Joseph was an employee or a partner in a joint venture. The evidence from Hiram is that Joseph was never an employee but that is contradicted by the evidence from Joseph.

A central issue in cases such as this is often the credibility of the participants and the witnesses.

A guide frequently relied on with respect to credibility issues is found in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 356-8 where the court said:

....The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour 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 a story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth....

In my view therefore, when assessing the credibility of a witness, a number of factors are to be considered. These include:

- the demeanour of the witness
- opportunities for knowledge
- powers of observation
- judgment and memory
- ability to describe clearly what has been said and heard
- the probability of the event happening in the manner suggested

The evidence provided by Hiram, W. Hiram, Everett and N. Hiram was at times confused, unclear, evasive and contradictory. For example, Hiram alleges that Joseph “did not do much except smoke pot all day” yet according to Everett, the hours of work provided by Joseph are in agreement with his recollection that they worked from daylight until it was too dark to work. Further the reasons provided by Hiram for the termination of Joseph kept changing, first it was for “smoking dope” then it was for “stealing gold” and finally at the hearing the reason was “eventually we got together and decided that Joseph was not doing any good so he left”. Further, Hiram initially acknowledged to the delegate of the Director that Joseph was an employee but subsequently changed his mind to state Joseph was a participant in a ‘joint venture’. Further Hiram advised the delegate of the Director that the group got together and decided to go into a ‘joint venture’ but the names of the persons involved was not supported by the evidence of W,

Hirak, Everett and N. Hirak. The above examples are not the total list of contradictory evidence provided on behalf of Hirak.

For the foregoing reasons, based on the evidence provided and on the balance of probabilities, where the evidence of Joseph differs from the evidence of the other witnesses, I prefer the evidence of Joseph.

With respect as to whether Joseph was an employee, the first test which must be applied is whether the person meets the definition of employee as contained in the *Act*. In my view, it is only necessary to consider the various common law tests if, after considering the definition of employee, there are still some issues outstanding. The *Act* defines employee as:

"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;*
- (emphasis added)

McFeeters, who was acknowledged by Everett and N. Hirak as being a “straight shooter” and “an honest man”, advised the delegate of the Director that Joseph was an employee. In my view, the evidence provided indicates that the work performed by Joseph, mechanical repairs and related duties, is work normally performed by an employee.

In any event, after a review of the various common law tests often relied upon to determine whether a person is an employee or an independent contractor, I am satisfied that Joseph is an employee for the following reasons.

1. The evidence of the advertisements placed at the Job Shop and HRDC which clearly set out that Hirak was seeking an employee, a Heavy Duty Mechanic, and not a partner in a ‘joint venture’.
2. Hirak, and in his absence his father W. Hirak, directed the work being done by Joseph.
3. The lease on the placer mine and most of the equipment involved belongs to Hirak.
4. Joseph did not invest anything into the operation of the placer mine except for his own labour.
5. Joseph was compensated on a percentage basis and did not have the opportunity for profit as his remuneration was directly related to the amount of labour provided.

6. The amounts Zubrecki paid to Joseph were on the instructions of Hirak.

For all of the above reasons, based on the evidence and on the balance of probabilities I conclude that Joseph was an employee of Hirak and as such is entitled to wages.

The *Act* requires that an employer pay an employee *at least* minimum wage for all work performed.

I am satisfied that Joseph, as confirmed by Everett, worked the hours as listed in Joseph's daily records. I am further satisfied that the calculation of the wages owing performed by the delegate of the Director as correct in all respects.

Having concluded that Joseph was an employee entitled to wages, I must now consider whether he is entitled to compensation for length of service.

The obligation of an employer to pay compensation for length of service is set forth in Section 63 of the *Act* which provides:

Section 63, Liability resulting from length of service

(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows:

(i) one week's notice after 3 consecutive months of employment;

(ii) 2 weeks' notice after 12 consecutive months of employment;

(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just

cause.

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

(a) totaling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,

(b) dividing the total by 8, and

(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

Section 63 (3) (c) *supra* provides that the liability of an employer to pay compensation for length of service is discharged if, among other things, the employee was dismissed for 'just cause'. The issue therefore is whether Hiram had "just cause" to dismiss Joseph.

The evidence of Hiram with respect to the reasons for the termination of Joseph was inconsistent throughout the investigation and the hearing. The evidence of Everett was that after some heated words between himself and Hiram, Hiram told all of them (Everett, Rogers and Joseph) to get out.

There was no evidence of any misconduct on the behalf of Joseph to justify his termination. This is further confirmed by Everett contacting Joseph after they left the mine site to see if Joseph was interested in returning to work.

For all of the above reasons and based on the evidence provided, I conclude that Joseph is entitled to compensation for length of service.

The total period of Joseph's employment (less than 1 year) generates an entitlement to 1 weeks wages as compensation for length of service.

I am further satisfied that the calculation of compensation for length of service as performed by the delegate of the Director in the Determination is correct in all respects.

The appeal by Hiram is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated November 10, 1999 be confirmed in the amount of **\$10,036.03** together with whatever interest has accrued pursuant to Section 88 of the *Act*.

**Hans Suhr
Adjudicator
Employment Standards Tribunal**