

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 -

Crystal Clean Building Maintenance of Canada

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Jerry W. Brown

FILE No.: 96/078

DATE OF DECISION: June 17, 1996

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against Determination No. CDET 000517 issued by the Director of Employment Standards (the "Director") through its delegate on December 28, 1995.

The Director determined that Vinton Digness, operating Crystal Clean Building Maintenance of Canada ("Crystal"), and Paragon Building Maintenance Ltd. ("Paragon") were in breach of part 2, section 8 and part 3 of the *Act* and that the complainant, Ron Goetz ("Goetz") was owed \$1,279.20 and the complainant, Marie-Claude Caramel ("Caramel") was owed \$1,279.20, being total wages earned of \$1,230 plus 4% vacation pay of \$49.20.

The original Determination was varied by the removal of Paragon.

Crystal claims that there is no liability for wages owed, because Goetz and Caramel were independent contractors, not employees, by virtue of a written contract between Crystal, Goetz and Caramel. Crystal claims that the contract, which contains a clause whereby Goetz and Caramel must give 30 days' notice of termination of the contract, should govern the employment relationship. More particularly, Crystal points to a clause in the contract dealing with notice and says that Goetz and Caramel, by leaving without giving proper notice, forfeited their pay and any monies owed.

Written submissions were received from Crystal and materials were provided by the Director's Delegate.

FACTS

Goetz and Caramel began work on April 2, 1995. Their last day of employment was April 29, 1995.

A contract was signed between the parties dated April 11, 1995. The contract states *inter alia* that:

Subcontractor agrees:

1. To give the contractor 30 days written notice of termination of the contract.
If 30 days are not given, the subcontractor forfeits all rights to monies outstanding.

Crystal has provided no records to refute the work hours claimed by Goetz and Caramel.

ISSUES TO BE DECIDED

1. Were Goetz and Caramel employees or independent contractors?
2. Did Goetz and Caramel quit or were they fired?
3. Was the parties relationship governed in whole or in part by the "contract"?
4. If any, how much compensation was owed to Goetz and Caramel?

ANALYSIS

Issue #1: Were Goetz and Caramel employees or independent contractors?

Crystal may have assumed, in part, based upon the "contract" that Goetz and Caramel were independent contractors, but it is my view that the relationship was one of employer/employee. The *Act* defines "employee" and "employer".

The *Act's* definition of an employee is as follows:

"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 the 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,

The *Act* defines an employer as follows:

"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.

Crystal may have attempted, through the written contract, to create an independent contractor status with Goetz and Caramel, but they failed. The degree of direction and control which the employer has in a relationship is one of the main factors in establishing an employment relationship. This is part of the four-fold test that is often employed in determining whether a person is an employee or an independent contractor. The "control" portion of the test asks whether an employer has direction and control over a person and whether an employer sets the time, place and way in which the work is done.

Goetz and Caramel were hired by Crystal and were given instruction by Crystal's staff. Goetz and Caramel were supervised, controlled and even disciplined by Crystal. None of the evidence provided by Goetz and Caramel was disputed by Crystal. The test also examines the ownership of the tools, whether there is a chance of profit or risk of loss. In this case there was no chance of profit or risk of loss in that Crystal held the contracts with the customers, not Goetz and Caramel. The only loss that Goetz and Caramel could have suffered would be in penalties imposed by Crystal rather than against any chance of profit. Goetz and Caramel have testified that the tools were owned by Crystal.

The high degree of control and direction exercised by Crystal leads me to find that the relationship was one of employer/employee and not that of an independent contractor.

Reviewing the materials presented I find on the balance of probabilities that Goetz and Caramel were employees and that Crystal was an employer.

Issue #2: Did Goetz and Caramel quit or were they fired?

Crystal's lawyer submitted that Goetz and Caramel quit after being instructed to redo a particular job. He submitted further that an Affidavit would be submitted, which was never received, from

Crystal with respect to the circumstances of Goetz and Caramel quitting and says that the entire matter is more fact driven than based on any legal distinctions.

Crystal argues that Goetz quit after a disagreement with his "supervisor". Crystal claims that Caramel quit on the same day without any notice but provides no reason for her terminating her employment.

Goetz and Caramel submit that they were fired by Crystal after arriving at a work site.

I find Goetz's and Caramel's version of the circumstances surrounding the termination of their employment supported by the facts.

I therefore find that Goetz and Caramel were fired and did not quit.

Issue #3: Was the parties relationship governed in whole or in part by the "contract"?

Even if the parties were governed by the "contract", the issue of the 30 days notice and forfeiting monies owed because they did not give proper notice is not relevant as Goetz and Caramel were fired and did not quit.

Further, section 8 of the *Act* provides:

Section 8: No false representations

8. An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting
 - (a) the availability of a position,
 - (b) the type of work,
 - (c) the wages, or
 - (d) the conditions of employment.

Other than indicating that the "contract" was signed by the parties and should govern, Crystal did not refute any of the circumstances surrounding the signing of the contract which Goetz and Caramel have submitted in their evidence. Goetz and Caramel testified that there was an agreement made as to the rate and method of their remuneration. Following this agreement a backdated contract was presented to them, which they claim was not a correct description of their agreement.

Goetz and Caramel argue that the written contract is not an accurate representation of the agreement between the parties. I agree. I find this document unable to completely and clearly define the relationship between the parties. I further find that the contract does not represent the terms of employment originally agreed upon by the parties, particularly the clause dealing with the notice required by Goetz and Caramel.

Also, section 4 of the *Act* sets out certain minimum standards that cannot be contracted out of except in certain limited instances. This is not one of those circumstances. Wages must be paid for work performed and must be based, at a minimum, on the minimum wage.

Section 21 of the *Act* provides *inter alia* that there is to be no withholding from pay. Therefore, Crystal is not entitled to withhold wages on the basis of the "contract".

Issue #4: If any, how much compensation was owed to Goetz and Caramel?

Crystal did not provide any records of the hours worked and the material before me is based solely on Goetz's and Caramel's records. Given the fact that Crystal did not provide any evidence to refute Goetz's and Caramel's records, I find that they are the only records which are to be used in calculating the wages owed to Goetz and Caramel.

In summary, I find: that Goetz and Caramel are employees; that Crystal was the employer; that Goetz and Caramel performed work for Crystal; and that Goetz and Caramel did not receive minimum wage as prescribed by the Regulations. Given these findings, there is nothing before me which persuades me to vary or cancel the Determination of the Director's Delegate in this matter. There is also nothing before me which persuades me to amend or vary the calculations put forth by the Director's Delegate.

ORDER

In summary, I order under Section 115 of the *Act*, that this appeal be dismissed and that Determination No. CDET 000517 be confirmed and that Goetz is entitled to compensation by Crystal in the amount of \$1,279.20 and that Caramel is entitled to compensation by Crystal in the amount of \$1,279.20.

JERRY W. BROWN
Adjudicator
Employment Standards Tribunal

EKB:99303