

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 -

John David Aubin
Operating As Super Dave's Enterprises
(The "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(The "Director")

ADJUDICATOR: Richard S. Longpre

FILE NO.: 96/668

Date Of Hearing: February 24, 1997

DATE OF DECISION: **MARCH 3, 1997**

DECISION

APEARANCES

Dave Aubin	for the Employer
Tom Bagley	for himself
Rob Greydanus	for himself
Terry Hughes	for the Director

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 the *Employment Standards Act*. The Employer seeks review of Determination CDET No. 004286. The Employer challenges the Determination's conclusion that Greydanus was owed vacation pay, statutory holiday pay, two week termination pay and interest for a total of \$3,717.72. Bagley was owed similar back payments totaling \$1,479.59. The Employer argued they were both contractors and not employees of his company. The monetary payments were not owed to either.

ISSUE TO BE DECIDED

Were Bagley and Greydanus employees or contractors while working for the Employer?

FACTS

Aubin operates a reasonably large second hand appliance shop for commercial and restaurant equipment and store fixtures. Used products are bought and put into storage. When purchased, Aubin's shop puts the equipment into running order.

Greydanus was doing a small amount of appliance repair work from his home when he met Aubin. In October 1994, Aubin brought him into his shop to work on equipment. Bagley gave Aubin a resume of his background in March 1996. After a short discussion, Aubin gave Bagley the opportunity to work in the shop although he did not have much experience in this area of work. Bagley worked on the same terms as Greydanus. Greydanus was terminated in March 1996. Bagley was terminated in August 1996.

From the out set of their work in Aubin's shop, Greydanus and Bagley were paid a straight time rate for all hours worked. No deductions were made from their cheques. In all respects they were paid as contractors. This form of payment was by mutual agreement.

Aubin's shop handled a multiplicity of appliances. Aubin acknowledged that Greydanus was capable to do work others could not do. The shop also hired a number of contractors

who worked in specific areas of work. None of these contractors worked to the same extent, or even close to the same extent, as Greydanus and Bagley worked in the shop.

ANALYSIS

Hughes reviewed the criteria used by Employment Standards in determining employee status. He noted that Greydanus and Bagley worked full time for the Employer. They worked as directed. The work they performed was entirely integrated into the business. Aubin owned virtually all of the tools they worked with in performing the assigned work. They had no chance of profit nor risk of loss. Greydanus and Bagley performed work for \$15 per hour. The contractors that were used occasionally, charged Aubin much more for an hour of work. Finally, Greydanus worked in this manner for a year and a half. Bagley worked in this manner until he was terminated after four months.

In his reply, Aubin took issue with Hughes' review of some of the evidence. Little of this was persuasive given all of the evidence before me. At the end of his argument, Aubin acknowledged that under the terms of the *Act*, Greydanus and Bagley were employees. Aubin, however, took great issue with the fact that the employment arrangements of both Greydanus and Bagley were by agreement. Greydanus had specially asked that "contractual" terms be put in place for personal reasons. Bagley was given a chance to see if he could perform the work. He was not hired until his abilities were determined. Aubin disputed the *Act's* infringement on the rights of the parties to make these arrangements.

Hughes pointed out Section 4 of the *Act* that prohibits parties from waiving their rights. It reads:

4. 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.

The Sections 43, 49, 61 and 69 are not relevant to these proceeding.

The *Act's* "infringement" comes from an extensive review of working relationships in the Province. The review had little difficulty in concluding its necessity. The evidence established that Greydanus and Bagley were employees of the Employer for the periods in question. I agree with the Determination that the Employer owes Greydanus \$3,717.72 plus interest and that it owes Bagley \$1,479.59 plus interest.

ORDER

Pursuant to Section 115 of the *Employment Standards Act*, I order that Determination CDET No. 004286 be confirmed.

Richard S. Longpre
Adjudicator
Employment Standards Tribunal

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