

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

Huso Hadzic

("Hadzic")

-of a Determination issued by-

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE NO.: File No. 96/161

DATE OF HEARING: May 17, 1996

DATE OF DECISION: June 3, 1996

DECISION

APPEARANCES

Huso Hadzic on his own behalf
Gulistan Shariff for Hiwits Consulting Inc.
Murray N. Superle for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Huso Hadzic ("Hadzic") pursuant to section 112 of the Employment Standards Act (the "Act") from Determination No. CDET 001093 issued by the Director of Employment Standards (the "Director") on February 8, 1996. The Director determined that Hiwits Consulting Inc. ("Hiwits") did not owe any monies whatsoever to Hadzic.

FACTS

According to Ms. Gulistan Shariff ("Shariff"), the sole officer, director and shareholder of Hitwits, and who was also the sole witness for Hiwits at the appeal hearing, Hadzic was retained as an independent contractor under three separate contracts. Hadzic was to be paid the sum of \$500 for each of the three contracts which involved:

- i) preparing "demonstration meals" which may have been placed on the menu of a fast-food style Greek restaurant that was in the planning stages. The restaurant was to be located in the food court at the Park Royal shopping mall in West Vancouver, B.C. I might add that this restaurant never proceeded beyond the planning stages.
- ii) transporting certain goods and equipment for Hiwits; and
- iii) doing some typing and other work for Hiwits.

Hadzic takes the view that he was an employee of Hiwits during the period July 10 to September 9 or 10, 1995 and that he is owed approximately \$1,660 in unpaid wages.

It is common ground that Hiwits issued three cheques to Hadzic for his services in the amounts of \$550 (April 2, 1995); \$500 (September 1, 1995); and \$534.50 (September 8, 1995). I understand from both parties that the first cheque was dated April 2, 1995 in error--I note that the cheque was cleared on August 3, 1995. It also appears to be agreed between the parties that the extra \$50 and \$34.50 for the first and third cheques represents reimbursement for expenses and not wages.

Hadzic takes the position that the third cheque represents payment for services rendered to Hiwits by Hadzic's daughter. I cannot accept that submission in light of the fact that the cheque is made payable to Hadzic, the cheque references his social insurance number and was not endorsed by Hadzic to his daughter. If the daughter has a claim for unpaid wages, she should pursue that claim in a separate proceeding.

ISSUES TO BE DECIDED

Two issues need to be decided. First, was Hadzic an independent contractor or an employee? Second, if he was an employee, has he been fully paid for the hours that he worked?

ANALYSIS

I must point out at the outset that the evidence in this case is quite unsatisfactory. Neither Hiwits or Hadzic have adequate records. Nevertheless, based on the fragmentary documentary record that is before me, the parties' testimony and the testimony of the witnesses called by Hadzic, I am of the opinion that Hadzic was an employee of Hiwits and that he has not been fully paid for all services rendered to that firm.

Was Hadzic an Employee or an Independent Contractor?

The Director determined that Hadzic was an employee based on the following factors: Hiwits exercised direction and control over Hadzic; Hadzic used equipment that was provided by Hiwits; and Hadzic appeared to be in a position of economic dependence on Hiwits. All of these factors were supported by the evidence before me. To this list I would add that Hadzic worked, primarily, at the home (in a basement work area) of the principal of Hiwits and Hadzic was provided with a key to that work area. He also on occasion drove a vehicle owned by Shariff.

I agree with the Director that, in these circumstances, Hadzic's relationship with Hiwits was more akin to an employment relationship than an independent contractor relationship. Further, during the course of her evidence, Shariff acknowledged that she now "agrees that he [Hadzic] was an employee".

Has Hadzic been fully paid for his services?

As I indicated above, the evidence as to the hours worked and the services rendered by Hadzic is incomplete. There is no clear evidence before me as to the rate that Hadzic was to be paid. Hadzic indicated during his testimony that there were discussions in which the figure of \$22,000 per year was mentioned but this latter figure was a tentative one and was based on the assumption that the Greek restaurant would open with Hadzic as its chief cook. In the absence of any evidence as to an agreed wage, I accept Mr. Superle's position, expressed in the Calculation Schedule to the Determination, that the statutory minimum wage of \$6.50 in effect during Hadzic's employment should apply.

As to the actual hours worked, Hadzic maintains that he worked about eight hours per day during July 1995 and ten to twelve hours per day in August. Hiwits has no payroll records or hours of work schedules which can be used to calculate Hadzic's actual hours worked. Both Jenna Graham and Razija Hadzic (Hadzic's sister), former employees, testified that Hadzic was working at Shariff's home from about 9 A.M. to 5 P.M. each day. As Shariff was often not at her home during the day she acknowledged that Hadzic may have worked the hours that he claimed to have worked. Shariff was not as careful in monitoring Hadzic's working hours as perhaps she should have been because she believed that Hadzic was working under a series of "fixed price contracts".

According to Shariff, Hadzic worked about eight days in July; Hadzic says he worked thirteen days. Shariff testified that Hadzic had been at her home somewhere between fifteen and seventeen days in August. Hadzic maintains that he worked twenty days in August. In addition, according to Hadzic's calendar, he worked two days in September. I should also note that while I am satisfied that Hadzic was on-site or otherwise engaged in duties on behalf of Hiwits, I pass no comment on the actual value to the employer of the services rendered. It is clear, in this case, that the employer was not as diligent as it might have been in terms of supervising the activities of Hadzic.

I am not satisfied that Hadzic worked all of the hours that he submitted he worked; on the other hand, I am satisfied, on a balance of probabilities, that he was on site at Ms. Shariff's home, or otherwise working on Hiwits' behalf, between the hours of 9 A.M. to 5 P.M. for about ten days in July; twenty days in August and two days in September.

Accordingly, Hadzic is entitled to the following wages:

July 1995:	10 days x (\$6.50 per hour x 8 hours per day)	= \$ 520.00
August 1995:	20 days x (\$6.50 per hour x 8 hours per day)	= \$1,040.00
September 1995:	2 days x (\$6.50 per hour x 8 hours per day)	= \$ 104.00
TOTAL WAGES EARNED (excluding vacation pay)		= \$1,664.00
Plus vacation pay (section 58): 4% of 1,664.00		= \$ 66.56
Subtotal:		<u>= \$1,730.56</u>
Less wages actually paid to Hadzic:		= \$1,500.00
Balance Due to Hadzic:		<u>= \$ 230.56</u>

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 001093 be varied and that a new Determination be issued as against Hiwits Consulting Inc. in the amount of \$230.56 together with interest to be calculated by the Director in accordance with section 88 of the *Act*. If there is a

dispute regarding the interest calculation, the parties may make further written submissions to the Employment Standards Tribunal on that specific matter.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal