

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 -

Treviso Home Builders
("Treviso")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: James Wolfgang

FILE NO.: 96/047

DATE OF HEARING: May 6, 1996

DATE OF DECISION: June 3, 1996

DECISION

APPEARANCES

Tino Mattiuzzi	The Appellant
Gerard Bierman	Interested Party
Brenda Lee Bierman	Witness for the Interested Party
Myron Wallace	Delegate for the Director of Employment Standards

OVERVIEW

This is an appeal by 2793504 Canada Inc. operating Treviso Home Builders (Treviso) pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination No. CDET #000271 issued by the Director of the Employment Standards on November 30, 1995. In this appeal Treviso claims no wages are owing to Gerard Bierman (Bierman).

PRELIMINARY MATTER

A challenge was made by Tino Mattiuzzi, of Treviso Home Builders, regarding the timeliness of Bierman's claim. I determined I would hear all of the evidence and would rule later on time limits.

ISSUE TO BE DECIDED

Is Bierman's complaint timely? If so, is Treviso required to pay any wages to Bierman?

FACTS

Treviso had a contract dated October 26, 1994 with Desmel Enterprises Ltd., (Desmel), to construct four townhouses (Units 46, 47, 48, 49) at 2797 River Road, Chemainus.

Bierman had a working relationship with Treviso in September, October and November 1994, and from January 24, 1995 to the end of the Desmel contract.

Bierman worked with Guy Simard (Simard) and Myron Hartwig (Hartwig) throughout the project. Some other people were employed from time to time.

Desmel encountered financial difficulty toward the end of the project, leaving most creditors unpaid.

A Determination No. CDET #000271 was issued by the Director of Employment Standards on November 30, 1995 against Treviso in the amount of \$1,419.60.

ARGUMENTS

Treviso argued that the project was completed on March 17, 1995. As Bierman had not filed his complaint with Employment Standards until October 17, 1995 the six month limit on filing a complaint had expired on September 17, 1995.

Tino Mattiuzzi (Mattiuzzi) indicated he was out of the Desmel project on February 13, 1995 although technically Treviso still held the contract.

Mattiuzzi held a meeting with Simard, Hartwig and Bierman on February 13, 1995 at the job site. Mattiuzzi indicated he wanted out of the townhouse project as he was changing occupations. He offered the townhouse project to Simard, Hartwig and Bierman asking only for a finder's fee for the contract. Any profit would be divided between Simard, Hartwig and Bierman. They required some money until the first draw, which he supplied.

Simard, Hartwig and Bierman verbally agreed to the terms and commenced work February 13, 1995. Mattiuzzi claims he had no direct interest in the project from that time on. In effect, Simard, Hartwig and Bierman sub-contracted Units 46, 47, 48, 49, from Treviso.

Mattiuzzi supplied a sworn affidavit from Simard and a written statement from Hartwig which confirmed his evidence.

Simard's statement says in part, "At the commencement of this project we all (Hartwig, Bierman) agreed that all problem solving be handled in a democratic vote, salaries were deemed by experience and one person was elected to supply the majority of the tools."

Hartwig's statement also indicates they would supply their own special tools and would be paid by invoice at the end of each week. Further, "to divide the profit in a three way split (Guy Simard, Myron Hartwig and Gerard Bierman), if any existed, after the units were completed."

Mattiuzzi stated Bierman was paid based on invoiced hours. There were no deductions for Income Tax, U.I.C., or C.P.P. as Bierman was a contractor. This had been the normal practice going back to at least September 1994. Mattiuzzi provided invoices from Bierman

to support his position that Bierman had worked as a sub-contractor for Treviso during that time on various projects.

Mattiuzzi further provided copies of invoices submitted by him to Desmel for final payment when the project was completed March 17, 1995. He claimed Treviso had no other contracts on the Desmel project.

Mattiuzzi also supplied a photo copy of an airline ticket as evidence that he was out of the province as of April 2. The return date was not supplied.

The evidence of Bierman goes back to September 1994 in respect to Treviso. He admits he had worked for Treviso several times both as an employee and as a contractor. When working as an employee he claims the "invoices" were, in essence, time slips. On the townhouse project Bierman states he gave his time slips to Simard.

Bierman supplied a letter from Revenue Canada dated February 13, 1996 ruling that by their interpretation he was an employee from September 30, to November 10, 1994 and from January 24, to April 18, 1995.

He claims he did not take part in the meeting at the job-site on February 13, 1995 where the subcontract was discussed. He recalls something of the meeting but says he was not a party to the agreement.

He did not supply any special tools or equipment on the project, only the standard hand tools of a carpenter. He thought the special equipment and tools were owned or were rented by Treviso. He said they came out of Treviso's truck.

Brenda Lee Bierman's evidence was, on her way to work, she drove Bierman to the pick up point in Nanaimo until April 18, 1995.

ANALYSIS

We have the evidence of Mattiuzzi, the sworn affidavit of Simard and a written statement by Hartwig that the Treviso contract on Units 46, 47, 48, and 49, was completed on or about March 17, 1995. This is supported by copies of the two invoices #92586 and #92587, issued to Desmel Enterprises Ltd., by Treviso Home Builders on March 17, 1995 indicating that Units 46, 47, 48, and 49 are completed and requesting payment of the contract owing.

There is a follow up letter dated April 17, 1995 to Desmel Enterprises Ltd., from Treviso Home Builders signed by Simard restating the claim for payment on the completion of the townhouses and threatening legal action within three days if payment was not made.

Bierman claims he was employed by Treviso until April 18, 1995. He supplied the delegate with "Individual Time Sheets" showing he worked from March 20 to

April 18, 1995. As this evidence may be critical to establish timeliness we need to explore in depth the history of invoicing by Bierman.

From September 1994 until February 13, 1995 all of Bierman's invoices were submitted on a weekly or bi-weekly basis showing only the total hours worked in the period and the amount owing. The descriptions on the form stated "work as contract labour for Treviso Home Builders" or "worked for Treviso Home Builders contract labour tools" or words to that effect and were always on the same type of printed form.

A different pattern of billing occurs for the period of the Desmel contract (February 13 to March 24, 1995). Invoice #024683 dated March 30, 1995 is identified as a "Statement". It lists, sequentially, each week, the total number of hours worked and the amount owing for that week. Invoice #024683 differs from previous invoices in that it does not identify Treviso Home Builders but Desmel Ent., 2797 River Road, Chemainus and is a single billing for the six week period. It indicates he has not been paid in full and there is \$1,512.50 outstanding. The printed form is the same as those referred to in the paragraph above.

From March 20 to April 18, 1995 an entirely different form and method of billing occurs. The forms are marked "Individual Time Sheets", one for each week. On this form Bierman lists; the date, the name "Desmel", the starting time and the quitting time for each day, which varies, and the total hours worked. In some instances it states "no second coffee". The weekly hours are then totaled at the bottom of the column and are multiplied by the rate of pay, showing the total amount owing for that week.

The one exception is the form used for the single day April 18, 1995. The same printed form is used and shows: "Desmel", the starting time (09:00), quitting time (1:00 p.m.) and lists the hours worked on that day (4). However, Bierman does not complete the form to show the hourly rate nor the amount claimed.

It should be noted when Bierman did work for Treviso June 18, 1995, and for Robin's Donuts (Mattiuzzi's new business) on August 19, 1995 he had reverted to the forms used in his billings from September, 1994 to March 30, 1995.

It should also be noted in Mrs. Bierman's evidence for the period March 20 to April 18, she drove Bierman to the pick up point when she went to work. Bierman's time sheets for the period show starting times ranging from 08:00 to 11:30 and his quitting times ranged from 1:00 p.m. to 5:30 p.m. She would need very flexible hours of work to accommodate such a schedule.

We accept Bierman worked in the time period March 20 to April 18, 1995 as covered by the time sheets. The question is, did he work for Treviso and specifically on April 18, 1995? That is critical to his claim.

The evidence of Mattiuzzi, Simard and Hartwig is very strong on the date the Desmel contract was completed. If that indeed is fact, the six month limitation on the right to file a

complaint expired September 17, 1995 or very shortly thereafter. Bierman did not file his complaint until October 17, 1995.

I find, on the basis of probability, that Bierman's complaint is untimely and is therefore denied. Further, I believe it would have failed on other grounds.

On the basis of evidence presented, it is my opinion Bierman was a party to the agreement with Simard and Hartwig to take over the townhouse contract. I believed he viewed himself as a contractor up to and including the period February 13, to March 17, 1995. The pending bankruptcy of Desmel changed the situation. The final payment was not made to Treviso and the contractors, subcontractors and suppliers were left "holding the bag". As contractors to Treviso, Simard, Hartwig and Bierman stood to lose along with everyone else. Only employees would have any claim on Treviso. Mattiuzzi claimed he had no employees and even if he did, not after March 17, 1995.

With the project starting to fail, Bierman knew, as a contractor, his claim would be limited. He may have then decided to become an employee. I am strengthened in this belief by his failure to claim the \$1,512.50 still owing him from the March 30, 1995 invoice. Bierman made no claim to the Delegate for that amount but only claimed for the period of March 20 to April 18, 1995. To do so would have meant the involvement of Simard and Hartwig, something he may have sought to avoid, as both had stated neither worked with him after March 17, 1995.

The question becomes even more blurred as we review Bierman's claim to have been an employee throughout his relationship with Treviso. In all of that time he had no Income Tax, U.I.C. or C.P.P. deducted from his pay nor had he ever received a Record of Employment when he was laid off. When examined on that point he indicated he had forgotten or overlooked those items. He specifically said he did not worry about the U.I.C. as he had not worked enough weeks to claim.

We have no information as to what material Revenue Canada relied on to make their ruling on Bierman's insurability dated February 13, 1996. At the time of the hearing, Revenue Canada had not yet inspected Treviso's records. It is difficult to understand why Bierman would wait so long to seek such a ruling?

ORDER

In summary, I order under Section 115 of the *Act*, the Determination No. CDET #000271 be canceled.

James E. Wolfgang
Adjudicator
Employment Standards Tribunal

JEW:jel