

**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 -

Lawrence Robert  
("Robert")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** David Stevenson

**FILE No.:** 96/129

**DATE OF HEARING:** May 28, 1996

**DATE OF DECISION:** June 6, 1996

**DECISION**

**APPEARANCES:**

For Lawrence Robert:	Donald Wilkinson, Esq. Lawrence Robert
For Interior Ceramic Supplies:	Carolyn Finlayson Todd Valgardsson
For the Director:	No one appearing

**OVERVIEW**

On January 29, 1996, the Director of the Employment Standards Branch (the “director”) issued Determination No. CDET 000866 which dismissed a complaint by Lawrence Robert (“Robert”) on the basis that no employment relationship existed between Robert and Interior Ceramic Supplies (“ICS”). This is an appeal by Robert pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of that Determination.

I heard evidence from Robert, who testified on his own behalf. I received two affidavits supporting the appeal, from Laurier Arthur Robert, the appellant’s father, and from Lorna Ann Weston, a former employee of ICS. For ICS I heard evidence from Janet Rieberger, a present employee of ICS, Denise Filmore, a former employee of ICS, Shirley Burton, a director of the Boundary Creek Advocacy Group, Todd Valgardsson, owner of ICS and Carolyn Finlayson, owner of ICS.

**FACTS**

ICS is in the business of manufacturing ceramic products, primarily vases, and selling those products and other art from a small showroom in its premises. The business has existed for about twelve years, although it has been in Grand Forks for only two years. It is currently owned by Todd Valgardsson (“Valgardsson”) and Carolyn Finlayson (“Finlayson”). Finlayson is the sister of Robert. For approximately five months prior to April 9, 1995 Robert was living in Westbank with his parents. He was doing so because he was without work and without prospects. On April 9, 1995 Finlayson called the home of her father to ask if her brother could come to Grand Forks to do some work in the plant. On the evidence, she did so for three reasons. First, the “spray booth” in the plant was not venting properly and Finlayson felt her brother, who has considerable experience with things mechanical, might be able to help. Second, providing her brother with some work away from Westbank would give her parents a short “reprieve” from the need to maintain close supervision of Robert. I received some evidence from Robert’s father to the effect that he and his wife did not need a “reprieve” from the demands of having Robert in their home

and Robert did not need supervision, but I am satisfied from other evidence there was indeed a need and requirement to closely supervise Robert. This conclusion is based primarily on the evidence of what occurred on or about June 4, 1995 which I will detail later in this decision. Finally, Finlayson called her father because his approval was needed if Robert was to move away from his close supervision.

Finlayson told her father Robert would be needed for a week and he would receive two hundred dollars plus room and board. He approved. She then called Robert and asked him if he would come to Grand Forks on the terms I have just described. He agreed and a ride was arranged for him by his father with Denise Filmore. He arrived in Grand Forks April 10, 1995 and began work on the "spray room" venting on April 11, 1995. At the end of the week he did not go back to Westbank. It was unclear why he did not return as originally planned.

Robert stayed with Finlayson in an apartment above the plant. He received free room, free board, pocket money from time to time, cigarettes, magazines, some clothing and other items, such as restaurant meals, which Robert testified were a frequent cost during his stay. In return Robert performed some work around the apartment and the plant. It appears his father was also sending some things to Robert each week. These things were brought to Grand Forks by Valgardsson, who worked Monday to Friday in Westbank and drove to Grand Forks each Friday evening, worked at the business on the weekend and returned late Sunday evening to Westbank. On a day to day basis the business was run by Finlayson, with assistance from Valgardsson when he returned on the weekend.

Between April 11, 1995 and October 17, 1995, Robert spent most of his days and, according to him, many of his nights, in and around the plant. It is clear, however, that there was no requirement for him to present at any time in the plant and he was not subject to any control, in terms of what he did in and around the plant, by either Finlayson or Valgardsson. He did not punch a time clock or keep track of his hours of work in any other manner. There was no supervision of what he did in the plant. He was not directed to perform any particular task, although it is conceded on occasion he was asked if he would do small tasks and odd jobs. He was under no compulsion or requirement to do so and there was evidence, which I accept, many of the small tasks he was asked to do were left undone or incomplete. He was not required to conform to rules that applied to employees, such as hours of work. He could leave the plant as he wished. There was evidence that Robert on occasion returned to the apartment during the day to watch TV or sleep.

On two occasions Robert "disappeared", once in June and again in October. The facts around the first such occasion compel me to my conclusion about the need to closely supervise Robert. On or about June 1, 1995, Robert visited the residence of an employee of ICS, Dwayne Feist. From the evidence I am satisfied both of them got very intoxicated. Feist did not show up for work the following day and Robert did not return to the apartment for at least one day. When he did return he went to bed and slept for a full day. When his father learned what had happened, in the words of one witness, "the shit hit the fan". On June 4, 1995, he drove to Grand Forks, exchanged angry words with Finlayson about the incident and took Robert back to Westbank. It was the evidence of Valgardsson, which I accept, Robert remained in Westbank until late July, except for a few weekends when he was allowed to accompany Valgardsson to Grand Forks on his weekend trips. He returned to live with his sister full time when his parents went away on holiday. Dwayne Feist was fired for his misconduct.

On those days when he was in and around the plant, I am satisfied on the evidence Robert spent considerable time wandering without apparent purpose, working on his own inventions and personal projects, formulating plans for the expansion of the plant and business, although no such expansion was being considered by the owners, sitting idly in the back corner of the mould room and working on his tools.

In his complaint to the director, Robert claimed, with the exception of short periods in June and July, he had worked twelve hours per day, seven days per week for ICS and had never been paid. He reiterated that claim before me under oath and supported it with a document prepared in November, 1995 claiming a total of 1987 hours worked between April 11, 1995 and October 17, 1995. He also presented to me a twenty-one page document which he prepared for the hearing describing the work done by him in and around the plant, as well as work done in the apartment and at various locations outside the plant. There is some dispute about whether the work described by Robert in some of the entries was actually performed by him. The larger dispute is whether the work described represents any more than a collection of odd jobs which cumulatively are insufficient to constitute “work” as that term is defined in the *Act*.

### **ISSUE TO BE DECIDED**

The issue is whether an employment relationship existed between Robert and ICS in the period April 11, 1995 to October 17, 1995. If I find there was an employment relationship I would refer the matter back to the director.

### **ANALYSIS**

This case turns almost exclusively on my assessment of the credibility of the respective witnesses and the weight to be attributed to some of the evidence I received.

I will be blunt: I disbelieve Robert and do not accept his evidence on any contentious point of fact. I have a number of reasons for reaching this conclusion.

Apart from the inherent improbability of his working twelve hours per day, seven days per week (with few exceptions) for a period in excess of six months, with two breaks, he had no documentary support for this claim. His counsel filed an affidavit from Lorna Ann Weston. I am unable to give weight to her affidavit. She attested to a period of time between April and July, 1995, the overlap between her employment and the presence of Robert in and about the plant. She swears Robert worked “the entire time” their “employment” periods overlapped, except for one occasion, “when he missed a day or two”. Having already found that Robert was absent (except for some weekends) from Grand Forks from the beginning of June until the end of July, I reject her evidence on that point. Her assertion Denise Filmore complained to her “that it was so noisy where she lived on the weekends because Lawrence [Robert] would be working” was denied by Ms. Filmore. I was able to observe Ms. Filmore giving her evidence and responding to cross-examination and she impressed me as a witness. Also, the affidavit was sworn the 28th of May,

1996, the day of the hearing, and although present in Grand Forks at that time, claimed to be unable to attend the hearing. As such I was unable to assess her general demeanour or see her recollections tested on cross-examination. Her affidavit does not validate or corroborate the evidence of Robert.

I also received an affidavit from Robert's father. It contains statements of opinion which would be inadmissible, even if given *viva voce*, and speculative commentary about events and discussions of which he had no direct knowledge. As with Ms. Weston, I was unable to observe him as a witness and see his "evidence" tested in cross-examination. It is apparent from the content of the affidavit much of the information upon which it is based came from Robert. I give it no weight and it does not provide support for the claim made by Robert.

Robert attempted to support his claim by reference to a document he created three weeks after he left Grand Forks. On the evidence, I find this document to be a total fabrication. As well as being inconsistent with other evidence which I found to be far more believable, it was contradicted by his own journal, which he testified was a daily account of his "life", and from his own mouth in cross-examination.

On three occasions I requested him to refer to specific dates in the journal where his claim of work had been challenged. On October 14, 1995, he claimed seven hours work for that day. He claimed twelve hours for the following day. His daily journal indicated that on the 14th he worked on one of his own inventions, communicated with an acquaintance, arranged a ride to the library, went to the library and met his acquaintance. It was the evidence, and was conceded by Robert, that he "disappeared" in the afternoon of the 14th and did not return to the apartment or notify Finlayson of his whereabouts. He was not at the plant on the 15th. He could not have worked 19 hours on those two days as he claimed. It was also put to him in cross-examination that he was not in Grand Forks on June 14 and 15, 1995 even though he had claimed 24 hours worked on those two days. His journal confirmed his absence from Grand Forks on those two days. Faced with that irrefutable confirmation he conceded that the claims for those days was "a mistake". He asserted the twelve hour per day claim was only an average and there were many days when he worked in excess of twelve hours and sometimes all through the night. When asked to refer to a period of time in June and identify what he had done on those days, there were no entries for those days at all.

In both cross-examination and in questioning from me he was consistently evasive, never responding directly where he could obfuscate, exaggerate and pontificate in areas unrelated to the question.. His testimony was internally inconsistent and inconsistent with other evidence that had a greater preponderance of probability and which went unchallenged in cross-examination. For example, some of the claim included work Robert did in the apartment. He later stated was that work was for him personally. Janet Rieberger and Ms. Filmore testified Robert also spent much of his time while in the plant working on personal projects. This evidence was not challenged and was, in fact, partly confirmed by the October 14 journal entry.

On the other hand, I was impressed with the testimony of Todd Valgardsson. He was forthright and responsive, even in areas where his answers could have been against the interest of ICS. He

freely conceded that Robert had performed some work which was of benefit to ICS, including work on the “cyclone” and the “spray room” vent. He stated the twenty-one page document introduced by Robert as evidence of the work performed by him for ICS described a collection of odd jobs that amounted, in most instances, to a few minutes each and collectively would not have amounted to more than two weeks work. A series of photographs were introduced and graphically confirmed, in my view, his oral evidence.

He stated employees of ICS were paid every two weeks and the company had never been late or delinquent with its payroll. ICS never paid Robert any wage and there was no complaint from him during the time he was in Grand Forks. There was never any discussion with Robert about being paid or about any rate of pay. ICS has never paid more than minimum wage, making Robert’s claim of \$14.00 per hour unique in the history of the company. ICS had never employed a “millwright” or mechanic and one was not needed. During the time Robert was in Grand Forks, there never had been any discussion with him of employment with ICS. This was confirmed by Finlayson.

The complete absence of any control, the absence of any discussion of employment or terms of employment (including rate of pay), the absence of any operational need for a millwright or mechanic, no payment of wages for the entire period without complaint or comment by Robert, the presence of a discretion in Robert to do what he wanted, when he wanted to do it and the absence of any integration of Robert into the workplace or the workforce all mitigate against the existence of an employment relationship and I find there to be none. The appeal is dismissed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 000866, dated January 29, 1996 be confirmed.

*“David Stevenson”*

---

**David Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**

:jel