

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 -

Larry Leuven
("Leuven")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/133

DATE OF HEARING: June 5, 1996

DATE OF DECISION: June 19, 1996

- Fredericks is the owner of Pacwest.
- Some weeks later, Jahanbakhsh Toghiani-Rizi (“Rizi”) began working as a painter at the work site in Richmond.
- When the work in Richmond was completed, Leuven agreed with Fredericks that he would be paid \$15.00/hour.
- Initially, Leuven received payment each week. He was required to complete a time sheet each day and to submit these sheet to Fredericks each week. He received payment based on the hours recorded on the time sheets.
- Fredericks visited the work site almost every day.
- Leuven did not receive payment for all of the work he performed for Pacwest.
- Leuven also worked at a home in West Vancouver.
- Approximately one week after the work in West Vancouver was completed, Fredericks asked Leuven to sign a pre-printed standard form contract titled “Independent Contractor Agreement”. This document was signed by Leuven & Fredericks and dated October 1, 1995 and required the contractor to begin work on September 1, 1995.
- Leuven prepared an undated hand-written statement to Pacwest showing hours worked each week from week ending August 26, 1995 to week ending November 24, 1995.
- Pacwest supplied the paint, brushes, rollers and other equipment necessary to carry out the painting work. Leuven used his own step ladder.
- Leuven agreed with Fredericks that Pacwest would not make deductions for income tax, etc. from any payments made to him.
- Leuven worked as a painter for 45 years prior to retiring. He now works occasionally to supplement his retirement income.
- Pacwest is a drywall contractor.
- The owner of the homes in Richmond was not satisfied with the painting work performed and did not pay Pacwest the full amount of its contract with Pacwest.

ARGUMENT

Leuven argues that he was hired as a painter and was promised \$17.00/hour. In his view, he worked under the direction of Doug Roy, who was the foreman on the work site in Richmond. Leuven's evidence was that he agreed to sign the "Independent Contractor Agreement" after the work was completed because he believed that he would then be paid the \$1,517.00 owed to him by Pacwest. Leuven also asserted that Rizi became the foreman when Roy left the employment of Pacwest.

Fredericks argued on behalf of Pacwest that each of the painters (Roy, Leuven and Rizi) were independent contractors who had total control over how the work was performed and the length of time taken to complete the work. They each worked without supervision according to Fredericks because Pacwest is a drywall contractor with no expertise or experience in painting, Fredericks argued. He also argued that Pacwest relied on Leuven to decide details such as what type of paint to use and how to apply it. Fredericks acknowledged that Pacwest provided brushes and equipment, but he argued that the painters told him what he needed and he went and got it. In Pacwest's submission, Leuven is relying on the *Act* as a means of collecting a debt owed by a contractor to a sub-contractor.

The Reason Schedule attached to the Determination contains the following rationale for concluding that Leuven was not an employee:

It is discovered that Leuven had signed an independent contractor agreement with Pacwest before starting the jobs. Leuven was also invoicing for his works.

Pacwest had only instructed Leuven as to the requirement of the paint jobs and there was no supervision or controlling when the jobs were being done.

The principal type of business engaged by Pacwest was installing drywalls. The two jobs which Leuven was engaged in were the only two in the past year where painters were required by Pacwest.

All the factors discussed above indicated that Leuven was engaged as an independent contractor with Pacwest and was not an employee.

At the hearing, the Director's Delegate argued that Leuven "...was not coming to the Tribunal with clean hands." He argued that based on his forty five years in the construction industry, Leuven was aware of the consequences and implications of signing the agreement

with Pacwest. There were benefits to both Leuven and Pacwest. Leuven benefited by not having deductions taken from the payments made to him by Pacwest and there were income tax advantages also.

ANALYSIS

Section 1 of the *Act* contains the following definitions:

"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 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, and
- (e) a person who has a right of recall;

"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;

"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

- (2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

These definitions must be given a liberal interpretation according to the BC Court of Appeal [**Fenton v. Forensic Psychiatric Services Commission** (1991)56 BCLR (2d) 170].

It is these statutory definitions that I am required to interpret and apply to the facts of this appeal. [**Yellow Cab Ltd. v. Board of Industrial Relations** (1992) 114 DLR(3d)

427(SCC)]. However, there are several factors which have developed in the common law that assist the decision-making process. These factors include the following:

- Control by the employer over the work;
- ownership of tools;
- chance of profit/risk of loss;
- remuneration of staff;
- discipline/dismissal/hiring;
- perception of the relationship;
- intention of the parties; and
- integration into the employer's business.

The BC Supreme Court has noted that:

The courts, in determining the nature of a labour relationship, have looked beyond the language used by the parties in the contract and have, instead, assessed the nature of their daily relationship

**[Castlegar Taxi v. Director of Employment Standards
(1988) 58 BCLR (2d) 341]**

In the **Castlegar Taxi** case, Mr. Justice Josephson referred to the following passage from a decision of the BC Labour Relations Board:

The difficulty is that there is no single element in the normal makeup of an employee which is decisive, and which would tell us exactly what point of similarity is the one which counts. Normally, these various elements all go together but is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee...But while the legal conception of an employee can be stretched a fair distance, ultimately there must be some limits. It cannot encompass individuals who are in every respect essentially independent of the supposed employer.

**[Hospital Employee's Union v. Cranbrook and District
Hospital (1975) 1 C.L.R.B.R. 42]**

This is a case, which is not uncommon in small business ventures, where there is an advantage to **both parties** for Leuven to look like an employee for certain purposes and to look like a contractor for other purposes.

The reasons given by the Director's delegate contain two fundamental errors; the evidence shows that Leuven did not sign the Independent Contractor Agreement "...before starting the jobs"; and Leuven did not submit invoices to Pacwest.

When I apply the statutory definitions of "employee" and "employer" to the facts of this appeal, I am forced to the conclusion that Leuven was an employee under the *Act* for the following reasons:

- Leuven performed work normally performed by an employee;
- Fredericks exercised control and direction over the work performed by Leuven;
- Pacwest owned the tools and equipment used by Leuven in performing the work;
- Leuven had no chance of profit. He was to be paid \$17.00 (subsequently \$15.00) for each hour he worked;
- There was not a meeting of the minds to enter into the "Independent Contractor Agreement";
- The Independent Contractor Agreement was signed by Leuven after the work was completed for the sole purpose of collecting his unpaid earnings;
- Leuven was integrated into Pacwest's business operation in that he was working with and under the general direction of Fredericks and or Roy; and
- Pacwest, not Leuven, selected the employees to perform the work.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination be varied to show that Leuven was an employee of Pacwest and that Pacwest owes Leuven the sum of \$1,517.00 in unpaid wages plus 4% vacation pay pursuant to Section 58 of the *Act*.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sf