

An appeal

- by -

Cecilya Gareau operating as CCM Flagging
("Gareau o/a CCM")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: M. Gwendolynne Taylor

FILE No.: 2002/7

DATE OF DECISION: April 19, 2002

DECISION

OVERVIEW

This is an appeal pursuant to section 112 of the *Employment Standards Act* (the “Act”) by Cecilya Gareau (“Gareau”), operating as CCM Flagging, of a determination issued by the Director of Employment Standards (the “Director”) on December 17, 2001. The Determination concluded that Gareau had contravened sections 40, 58 and 18 of the *Act* by failing to pay overtime, vacation pay and wages owing at termination of the employment of two employees, Harrington and Lainchbury. The Director ordered Gareau to pay \$546.00 plus interest to Harrington and \$757.04 plus interest to Lainchbury.

Gareau appealed on the grounds that the employees had already been paid and that the hourly rate and terms of employment relied on by the Director were incorrect. Gareau attached statements of earnings and payment for each employee. The Director replied to the appeal submitting that Gareau failed or refused to produce records, documentation or evidence of any kind, despite several attempts by the Director to obtain evidence.

ISSUE

1. Is Gareau entitled to introduce evidence in appeal that it failed to provide to the Director?
2. Has Gareau demonstrate that the Director erred in relying on the evidence of the employees?

THE FACTS

Cecilya Gareau, operating as CCM Flagging, operates a traffic control flagging business. Harrington was employed as a flagperson from July 11 to 26, 2001; Lainchbury was employed from July 10 to 29, 2001. The issues before the Director were whether the claimants were “employees” within the definition in the *Act* and whether they had received payment for all hours worked including regular wages, overtime pay and annual vacation pay. Both claimants submitted that they had received no payment from Gareau.

Gareau argued that the claimants had been hired as subcontractors and, therefore, were not employees. Despite correspondence, a Demand for Records mailed on September 14, 2001, and telephone calls, Gareau did not provide any records or evidence. On November 20, 2001, Gareau telephoned the Director to advise she had been in a car accident but would have the documents in by the end of the week. On November 30, 2001, the Director sent a final letter setting out the wage calculations and requesting submissions by December 13, 2001. The Determination was issued December 17, 2001.

The Director found that they were employees and entitled to the provisions of the *Act*. Based on the evidence provided by the complainants, the Director determined that they were entitled to wages as set out above.

ARGUMENT

Gareau submitted that she had been hospitalized and then went to Newfoundland to deal with a family emergency. She submitted that the hourly rate and terms of employment provided by.

Harrington and Lainchbury, and relied on by the Director, were incorrect. Further, Gareau had already paid them. Gareau attached statements of earnings and payment for each employee.

The Director submitted that since Gareau failed or refused to produce records, documentation or evidence of any kind, despite the Demand for Records and several other attempts by the Director to obtain evidence, the appeal should be not be allowed. However, the Director also submitted that if proof of payment is confirmed, the Director would make the necessary adjustments to the amounts owing in the determination.

REASONS

I concur with the Director that it is not now open to Gareau to present evidence when she either failed or refused to produce during the investigation. While I appreciate that she may have had health problems and been required to attend to family matters, there was still ample opportunity for her to have complied with the Director's Demand for Records prior to her accident in November 2001. An appeal under section 112 is not intended to be a complete re-hearing of a complaint. It is intended to provide an opportunity for a party to demonstrate that the Director made an error in the facts or the law.

Gareau asks that the Determination be set aside. I am not prepared to accede to that request. The Director did not err in basing the Determination on the evidence presented by the complainants. I will not set aside the Director's findings on hourly wage, hours worked or total wages owing for their employment. However, I am prepared to refer this back to the Director for proof of payment and recalculation of the amounts owing.

Accordingly, I refer this matter back to the Director to make the correction. However, the onus is on Gareau to provide the proof of payment. Then it will be a straightforward calculation for the Director to deduct the amounts paid from the wages owed, and add an amount for interest.

I will allow Gareau two (2) weeks from the date of this Order to provide the Director with proof, in the form of cancelled cheques or other proof satisfactory to the Director.

I request the Director to report back to me in three (3) weeks and I will issue a final Order.

ORDER

This matter is referred back to the Director as specified above.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal