Employment Standards TRIBUNAL

An appeal

- by -

Elaine Salo, operating as Coastal Cleaners

- 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: John M. Orr

FILE No.: 2000/763

DATE OF DECISION: March 27, 2001

DECISION

OVERVIEW

This is an appeal by Elaine Salo operating as Coastal Cleaners ("Salo") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination (File No.098777) dated October 13, 2000 by the Director of Employment Standards (the "Director").

Douglas Mattson ("Mattson") worked for Salo from November 19, 1998 to August 03, 1999. Mattson was paid as a sub contractor on a pure commission basis. The Director determined that Mattson was not a sub contractor and was in fact an employee and therefore entitled to benefits under the *Act* such as overtime wages, statutory holiday pay, and vacation pay.

Salo appeals this decision on the grounds that the Director was wrong in law in finding an employer/employee relationship between the parties. Salo submits that the parties had entered into an agreement or contract that clearly stipulated that Mattson was a contractor and not an employee. Salo also appeals the factual basis for the calculation of hours worked and the methodology of calculation used by the Director's delegate ("the delegate").

ISSUE TO BE DECIDED

The issues to be decided on this appeal are:

1. whether the delegate made an error of law in finding that Mattson was an employee and not a contractor.

2. whether the hours claimed were reasonably calculated by the delegate;

3. whether the method of calculation of the hourly wage rate was proper.

ANALYSIS

The relevant definitions contained in the *Act* are as follows:

> "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,

> "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.
>
> "wages" includes
>
> (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
>
> "work" means the labour or services an employee performs is for an employer whether in the employee's residence or elsewhere

It has often been submitted that a careful and objective consideration of these definitions reveals that they are so tautological, circular and wide as to be meaningless. It has also been submitted that applying these definitions it is virtually inconceivable to find any relationship between two people for compensation in exchange for any effort or information on any kind, to be other than an employment relationship.

However, it is the responsibility of the Director and of this Tribunal to interpret the legislation in a logical and consistent manner. As noted by the Tribunal in *Re: National Courier Service*, BCEST #D521/98:

> "None of these definitions are particularly helpful to business people, employers, employees or this Tribunal. However, the bad drafting of the Act does not remove the responsibility from the Tribunal to applying these definitions in as logical a manner as possible no matter how wide a net it casts."

The delegate in this case applied a number of common law tests to assist in deciding the issue in the absence of any logical definitional assistance in the legislation. He made a careful and reasoned finding that gave due consideration to the arguments presented by Salo and came to a conclusion that was properly based in legal principle and completely consistent with the scope of the definition in the *Act.*

Business people and employers must come to understand that the legislation defines employee very broadly and it is not open to the employer to simply say that the work is on a contract basis. There must be very clear evidence that the person is in fact an independent entrepreneur operating his own and separate business. That evidence does not exist here. I am not persuaded that the delegate was wrong in coming to the conclusion that he did and therefore his decision on this point will be confirmed.

I am also not satisfied that the delegate made any errors in working out what hours were actually worked by the employee. The delegate applied all of the information with which he was provided by the employer and the employee at the time. It is not open to the employer to now attempt to provide other information or "expert" estimates to contradict those figures. I conclude that the hours worked by the employee should also be confirmed.

However I am not in agreement with the methodology used by the delegate in calculating the rate of pay. My concern is with the application of the definition in the *Act* of "**regular wage**". This definition is used in calculating overtime, statutory holiday pay and vacation pay but is completely illogical when used in a situation where an employee is paid on a pure commission basis.

The irrationality of applying the definition in coming to assess a "regular wage" is that it results in an hourly rate that is never "regular". In this case it results in 18 different hourly rates varying from $8.03 per hour to $13.15 per hour. In fact the irrationality is exacerbated by the situation in which the less the employee works the higher his rate of overtime pay when he does work overtime.

For example an employee on a 20% commission who sells $1000.00 worth of product in a pay period receives $200.00 regardless of the hours worked. If the employee managed to earn the commission on one sale that only took one hour the "regular wage" is then $200.00 per hour for calculating that employee's statutory holiday pay but the other employee who worked 100 hours to make the sale the "regular wage" is $2.00 per hour. There is no inherent logic or fairness in applying the definition in those cases of pure commission sales where there are no stipulated hours of work.

The situation may be different where there is a base wage plus a commission because in those cases there is usually a regular work schedule associated with the base wage and then there is some reasonable consistency in the hours of work and the pay throughout the pay periods. In most pure commission situations there is no requirement to work any set number of hours either minimum or maximum and the formula in the *Act* fails both the employer and the employee.

Legislation should never be applied and interpreted in a manner that results in absurdity. In *Re: Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 the Supreme Court of Canada stated:

> It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to *Cote, supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of the statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes, supra*, at p.88*).*

Section 2 of the *Act* provides that the purposes of the *Act* are (in part):

> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
>
> (b) to promote the fair treatment of employees and employers;

As noted above the strict application of the definition of "regular wage" to a situation in which there are no regular hours or any hourly, weekly or monthly wage creates absurd results in which the so called regular wage is never regular. The result is unreasonable, inequitable, illogical and incompatible with the stated purposes of the legislation.

In my opinion, in the case of pure commission sales, the fair and rational interpretation of the purposes and application of the legislation is limited to ensuring that the commission sales person receives at least minimum wage for the hours worked in each pay period. The legislation is also limited to ensuring that overtime premiums are paid based on at least the minimum wage. Therefore in my opinion where there is in fact no regular wage and no hourly work structure in existence attempting to force the pure commission structure into the definition of "regular wage" results in absurdity and should not be attempted.

To be clear, I base this decision on the following significant findings of fact. Firstly, there is no agreed upon hourly, weekly or monthly wage. Secondly, there are no required hours of work and hours of work are not controlled by the employer.

The regular wage in cases such as this, where there is no agreed upon wage or hourly work structure whatsoever and there are no set hours of work, should be the minimum wage. The intent of the legislation is to ensure that the employee is paid at least minimum wage plus premiums for all hours worked.

I conclude and find that, in this case, the "regular wage" should be the minimum wage in place at the time together with any applicable premiums. The "regular wage" for the calculation of statutory holiday pay should also be the minimum wage.

I will refer this matter back to the delegate to perform the calculations of all wages and premiums using a regular wage rate equal to the minimum wage in place at the time together with the appropriate premiums for overtime and statutory holidays.

I am prepared to remain seized of this matter pending those calculations.

ORDER

I order, under Section 115 of the *Act*, that the matter is referred back to the Director.

JOHN M. ORR

John M. Orr
Adjudicator
Employment Standards Tribunal