EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

City Import Centre 1997 Ltd.
("City Import " or the " Employer ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/074

HEARING DATE: April 17, 2000

DATE OF DECISION: April 26, 2000

DECISION

APPEARANCES

Mr. Randy Bieber on behalf of the Employer

Mr. Glen Mollon on behalf of himself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on January 20, 2000 which determined that City Import was liable for unpaid wages to Glen Mollon in the amount of $1,127.69. The Employer argues that the Determination is wrong because Mollon was an independent contractor. There is no dispute with respect to the amount owed should I find that Mollon was an employee.

FACTS AND ANALYSIS

The Employer's business is car repair, and Mollon worked as a car mechanic between April 10, 1999 and May 3, 1999.

The only issue before me is whether Johnson was an employee or an independent contractor.

The *Act* defines an "employee" broadly (Section 1).

> *"employees" includes*
>
> > *(a) a 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,*
>
> *An "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;*

I approach these definitions with the following principles in mind. It is well established that the definitions are to be given a broad and liberal interpretation. The basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (*Machtinger v. HOJ Industries Ltd*., <1992> 1 S.C.R. 986). Moreover, my interpretation must take into account the purposes of the *Act* (*Interpretation Act*). The Tribunal has on many occasions confirmed the remedial nature of the *Act*. Section 2 provides (in part):

> *2. The purposes of this Act are as follows:*
>
> *(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;*

Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and "integration" (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, <1947> 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of "whose business is it".

The delegate considered these tests in making his determination that Mollon was an employee and not an independent contractor. In any event, on the basis of the evidence before me at the hearing, and the applicable legal principles, I would agree with the delegate's conclusion that Mollon was an employee. Mollon was hired to work for an hourly rate of $12.00, he was paid by the Employer. The Employer invoiced and was paid by the customers. The work was performed in the Employer's "shop" utilizing its equipment. Mollon explains that he "did the work Randy gave him to do". There was no dispute that Mollon also used his own "small tools". In my view, that does not make him an independent contractor. It is not uncommon for trades people to use their own tools. The Employer acknowledged that the responsibility for the work rested with it. In short, considering the relationship between the parties as a whole, including the factors of control, ownership of tools, chance of profit/risk of loss and integration, and "whose business is it", there is little doubt that Mollon was an employee of City Import.

The Employer also argues that the delegate erred when he stated that there was no evidence that Mollon was an independent contractor. The Employer relies on an invoice that states that Mollon was paid for "contract labour" and notes that one of the cheques issued to Mollon expressly states that it was for "contract labour". Mollon notes that these documents are dated almost two weeks after his last day of work and explains that he was essentially prepared to agree to "whatever" to get the money he was owed as he found himself in "desperate" circumstances due to the impending birth of his first child. In the circumstances, I am reluctant to place much weight on the invoice and the notation on the cheque. There is, in my view, nothing equivocal about the notation "contract labour". Moreover, Mollon explains that he applied and was hired

as an apprentice and that he could not hold himself out to be a qualified mechanic. The Employer explains that Mollon was hired as a contractor. Mollon says that the issue of him being a "contractor" did not come up until the end of the relationship. Even if I agreed that the parties had intended the relationship to be an independent contractor relationship, and, in the circumstances, I do not, in *Straume v. Point Grey Holdings Ltd.*, <1990> B.C.J. No. 365 (B.C.S.C.), the court noted, at page 3, that "the declared intention and classification of the contract parties may not bind statutory or third parties not party to the contract as against its true nature". While the parties' intent is relevant in an action for wrongful dismissal, *i.e.*, an action founded in contract, and may be a relevant factor before the Tribunal, I do not agree, in view of the remedial nature of the statute, that much weight should be placed on this factor. As well, Section 4 of the *Act* specifically provides that an agreement to waive any of the requirements is of no effect.

In short, I am not persuaded to interfere with the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated January 20, 2000 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal