

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-

523961 B.C. Ltd. operating
as “C.B.M. Landscaping”

(“CBM Landscaping” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 99/110

DATE OF HEARING: May 3rd, 1999

DATE OF DECISION: May 11th, 1999

DECISION

APPEARANCES

Mohammad Hussain, Pres. & Director	for 523961 B.C. Ltd.
John Derek Setter	on his own behalf
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by 523961 B.C. Ltd. operating as “C.B.M. Landscaping” (“CBM Landscaping” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 2nd, 1999 under file number 91-099 (the “Determination”).

The Director’s delegate determined that CBM Landscaping owed its former employer, John Derek Setter (“Setter”), the sum of \$3,196.14 on account of unpaid wages and interest.

This appeal was heard in Chilliwack, B.C. on May 3rd, 1999 at which time I heard evidence and submissions from Mohammad Hussain, an officer and director of the employer and from Setter. The Director was not represented at the appeal hearing.

ISSUES TO BE DECIDED

The employer asserts that Setter was an independent contractor rather than an employee although the employer appears to be under some misapprehension regarding the legal distinction between those two concepts--*e.g.*, in its appeal documents, the employer states that Setter “was *employed*...to work as an independent landscape labourer”.

The employer also says that the amount of wages determined to be owing is incorrect.

The employer also raised a concern regarding whether or not some component of Setter's claim included noncompensable "travelling time".

FACTS AND ANALYSIS

In my view, Setter's relationship with CBM Landscaping cannot reasonably be characterized as anything other than an employment relationship. The employer itself treated Setter as an employee when it issued him a record of employment in July 1998. In all material respects Setter, who was working as a labourer/gardener for CBM Landscaping, was an employee as defined by the *Act*--he was directed and controlled by Mr. Hussain, he used CBM Landscaping's tools and equipment and he was paid an hourly wage for his labour. On each of the three paycheques issued to Setter by CBM Landscaping Setter was described as an "employee" and the usual employment remittances for employment insurance, Canada pension and income tax were shown as having been deducted.

I am satisfied that Setter was "on-duty" during the morning drives from Chilliwack to the various job sites around the lower mainland. Mr. Hussain did not have driver's licence and thus part of Setter's duties were to serve as Mr. Hussain's driver (on occasion another CBM employee was also driven by Setter, in a CBM vehicle, from Chilliwack to the job-site).

As for Setter's unpaid wage entitlement, Setter acknowledged having received the following payments from CBM Landscaping:

- \$910 cheque for the pay period ending March 22nd, 1998;
- \$1,080 cheque for the pay period ending April 4th, 1998;
- \$810 cheque for the pay period ending April 19th, 1998;
- three separate \$300 cash payments made on May 1st, 13th and 22nd, 1998.

Thus, in total, Setter was paid \$3,700 rather than the \$2,790 credited in the calculation report appended to the Determination. I understand the employer to assert that there may have been other cash payments but there is absolutely no evidence (such as a receipt) of such other payments having been made to Setter (Setter denies all but the three cash payments noted above).

It should be noted that the employer's position advanced to the delegate, namely, that Setter's employment ended as of April 17th, 1998, is inconsistent with the employer's present position that Setter was paid, in cash, some \$900 for work undertaken in May 1998. It should also be noted that the employer never raised the issue of Setter's "travel time" or his status as an independent contractor during the course of the delegate's investigation. Indeed, for the most part, the employer simply refused to participate, in any meaningful fashion, in the delegate's investigation.

I have no reason to doubt Setter's records as to his hours worked and, more fundamentally, the employer has not provided me with any contrary reliable employment records setting out Setter's hours of work. Accordingly, other than the above-noted adjustment for wages actually paid, the Determination must otherwise be upheld.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied to show an amount due to Setter for unpaid wages of **\$2,137** together with interest to be calculated by the Director in accordance with section 88 of the *Act*.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal