EMPLOYMENT STANDARDS TRIBUNAL

In the matter of two appeals pursuant to Section 112 of the

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

-by-

Raintree Kitchens Ltd.
("Raintree")

-and-

Pettirsch Furniture Manufacturing Inc.
("Pettirsch")

- of two Determinations issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE Nos.:	99/63 (Wage Determination) & 99/64 (Penalty Determination)
DATE OF HEARING:	April 21st, 1999
DATE OF DECISION:	May 31st, 1999

DECISION

APPEARANCES

Douglas Mackay	for Raintree Kitchens Ltd. and Pettirsch Furniture Manufacturing Inc.
G. Blair MacLeod	on his own behalf
No appearance	for the Director of Employment Standards

OVERVIEW

I have two appeals before me both brought by Raintree Kitchens Ltd. ("Raintree") and Pettirsch Furniture Manufacturing Inc. ("Pettirsch") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from two separate Determinations issued by a delegate of the Director of Employment Standards (the "Director") on January 14th, 1999 under file number 041-360. In one Determination, the delegate upheld G. Blair MacLeod's ("MacLeod") claim for unpaid wages and interest ($1,455.28); by way of this determination the Director also levied a $0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*. I shall refer to this latter Determination as the "Wage Determination".

In addition, Raintree and Pettirsch also appeal another Determination pursuant to which a $500 monetary penalty was levied for failure to produce employment records relating to MacLeod. I shall refer to this Determination as the "Penalty Determination".

The two appeals were heard consecutively at the Tribunal's offices in Vancouver on April 21st, 1999. I shall deal with each appeal in turn.

THE WAGE DETERMINATION

The Issue on Appeal

The delegate determined that Raintree and Pettirsch were "associated corporations" as defined by section 95 of the *Act;* neither Raintree nor Pettirsch challenge this

declaration. However, the appellants do assert that the Wage Determination ought to be cancelled because MacLeod was an independent contractor rather than an employee and, therefore, was not entitled to file a complaint under the *Act.*

The Evidence

MacLeod worked, largely independently, at Raintree's shop as a kitchen cabinet maker. MacLeod's co-worker, Ian Armour, testified that MacLeod set his own hours but that "95% of the time" MacLeod worked from 8:00 A.M. to 4:30 P.M. which were the regular shop hours. They both took regular lunch and coffee breaks. Both Armour and MacLeod used the large tools (saws etc.), small power tools and hand tools located in the shop; both were given their assignments each day by the shop foreman and then were expected to work on their own to finish their assigned tasks. In carrying out their tasks they both used materials--wood, glue, etc.--found in the shop although, on occasion, both used their own personal hand tools.

Armour's evidence was largely corroborated by Raintree's vice-president, Greg Ganton, who added that MacLeod sometimes did installation work away from the shop but that about 70% to 80% of his time was spent in the shop. Whether MacLeod was working in the shop or out of the shop on an installation job, MacLeod submitted an invoice which, in turn, was paid by Raintree. Shop work was generally billed by the hour; installation work was generally billed on the basis of an agreed "contract price".

Rob Fofonoff testified that he worked alongside MacLeod for about 9 months to a year in 1998 and his evidence was not materially different from that of Mr. Armour.

For his part, MacLeod merely confirmed that he used Raintree's equipment and took direction from a Raintree supervisor. On some invoices he claimed, and was paid, overtime. He was paid on the same regular payday as other Raintree employees and was directed to deliver his invoices on the Thursday before each Friday payday. While on occasion he used his own vehicle for outside installation work, more often he used a company-owned vehicle.

Analysis

Based on Raintree's *own evidence,* I am completely satisfied that MacLeod was an "employee" as that term is defined in section 1 of the *Act.* MacLeod reported to work each day at Raintree's shop, used Raintree's tools and materials and was given daily assignments from the shop foreman. MacLeod was in a position of

economic dependence vis-à-vis Raintree. Although the parties structured their relationship so as to make it appear that MacLeod was a contractor working on a fee for service basis (a position, I note, rejected by Revenue Canada), the reality of the situation was that there was an employer-employee relationship.

For the reasons set out in the Wage Determination, which I adopt, I find that MacLeod was properly awarded statutory holiday pay, compensation for length of service, vacation pay and interest.

Order

Pursuant to section 115 of the *Act*, I order that the Wage Determination be confirmed as issued in the amount of $1,455.28 together with additional interest, to be calculated by the Director, as and from January 15th, 1999, in accordance with section 88 of the *Act.* The $0 penalty is also confirmed.

THE PENALTY DETERMINATION

Facts and Analysis

During the course of the investigation into MacLeod's unpaid wage complaint, a Director's delegate issued, on November 6th, 1998, a "Demand for Employer Records" ("Demand") to Raintree and Pettirsch. Pursuant to this Demand, all employment records relating to MacLeod, and spanning the period November 17th, 1997 to September 30th, 1998, were to be produced on or before 4:30 P.M. on November 20th, 1998.

According to the testimony of Raintree's bookkeeper, Ms. Dee Sakawsky, MacLeod would submit to her, along with his invoice for hours worked, a series of time cards upon which he had recorded his daily hours and the particulars of the various jobs he had completed or worked on during the billing period. The information on these time cards--MacLeod used the usual time cards that were available for "regular" employees--was transferred to a computer program and the original cards were then destroyed. A Raintree cheque was issued to MacLeod in payment of his invoice.

In response to the Demand, Ms. Sakawsky prepared a letter, dated November 18th, 1998 (signed by Mr. Mackay), and forwarded it to the delegate; this letter explained the situation vis-à-vis the time cards. Raintree did produce, at that time, copies of cheques issued to MacLeod in payment of his invoices and copies of MacLeod's

invoices. In the absence of a reply to the November 18th letter, a follow-up letter was sent to the delegate on December 8th, 1998. The delegate did not reply to the December 8th letter and, on January 14th, 1999, the Penalty Determination was issued; it is clear from a perusal of the Penalty Determination that the delegate issued the determination because the "time cards" had been destroyed and thus could not be produced.

The "time cards" were, in my view, original payroll records that ought not to have been destroyed by Raintree. These records showed the hours worked by MacLeod each day and thus, by reason of subsections 28(1)(d) and 28(2) of the *Act,* were required to be kept and held for a period of 5 years following MacLeod's termination. In my opinion, an employer is not entitled to rely on its wrongful destruction of employment records as a lawful excuse for failing to produce such records upon a demand for production of those records being issued pursuant to section 85(1)(f) of the *Act* and section 46 of the *Regulation.*

Raintree submits that it was not obliged to comply with the Demand because MacLeod was not an "employee". In light of my findings in the Wage Determination appeal, namely, that MacLeod was a Raintree employee and not a mere independent contractor, this argument must fail.

Order

Pursuant to section 115 of the *Act*, I order that the Penalty Determination be confirmed as issued in the amount of $500.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal