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 -

Auto Pride Detail Centre
("Company")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Richard S. Longpre

FILE NO.: 98/167

DATE OF DECISION: June 9, 1998

DECISION

OVERVIEW

Auto Pride Detail Centre (the "Company") appealed, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), a Determination by a delegate of the Director of Employment Standards. The Determination, dated February 24, 1998, found that the two complainants, Tyler Fleming and Connie Garbutt, were not contractors but rather employees of the Company. The Determination concluded that Fleming was owed the minimum wage for hours worked as well as vacation pay. Garbutt was owed vacation pay. The Company was directed to pay a total of $850.09 to the two individuals.

ISSUE TO BE DECIDED

Lawerence Huth, on behalf of the Company, argue that the Determination was incorrect in deciding that Fleming and Garbutt were employees. Huth also argue that the amount awarded Fleming was incorrect.

FACTS

The Company is in the business of detailing cars: this was the work performed by Fleming and Garbutt. Each was paid a percentage of the cost the customer was charged for the detailing work they would perform on the customer's car. Fleming and Garbutt worked for the Company for a relatively short period of time.

In deciding that they were both employees, the delegate applied four factors to Fleming's and Garbutt's employment relationship with the Company: control, integration, economic reality and specific results.

On the first factor, control, Huth provided the work location, all cleaning supplies and the tools to be used each day of work. The delegate addressed the assignment of work as follows:

> I prefer the evidence of the complainants - it does not make sense that Huth would book appointments and promise customers when their vehicles would be ready with no idea at the beginning of each day if the staff would be there or be prepared to take on a given job.

The delegate found "some negotiation of commission" but it was not considered significant. With respect to dismissal, Huth stopped giving unsatisfactory workers any more jobs.

The second factor was integration. The Determination reads:

> Auto Pride is in the business of detailing vehicles - both Fleming and Garbutt provided their labour to accomplish this. In the absence of workers to detail the vehicles, there would be no business.

The third factor was economic reality. The delegate concluded that neither Fleming nor Garbutt had a chance of profit or a risk of loss. Their ability to "upsale" a customer was limited as they rarely dealt directly with the customer. Further, Fleming and Garbutt had not made a financial investment to work at the Company: neither one owned any tools or machinery. Fleming and Garbutt worked solely for the Company and could have stayed employed indefinitely.

The delegate defined the specific result test as follows:

> The Specific Result Test looks at the intent of the parties and whether a contact is to provide for a single service leading to a specific result or whether Fleming and Garbutt are simply required to provide general efforts on behalf of Auto Pride.

Fleming and Garbutt performed all of the work given them by the Company. Huth said that they could have sub-contracted the work: Fleming and Garbutt had no knowledge of this right. Also, Fleming and Garbutt understood that they had "an indefinite term of employment to provide labour."

The Company did not have a record of the hours worked for Fleming and Garbutt. Fleming had kept a record and it was accepted by the delegate. A minimum wage was applied to those hours. Garbutt had not kept a record of the hours she worked. The delegate did not find that she was owed wages. Both Fleming and Garbutt were awarded vacation pay. The delegate concluded that the two employees were owed a total of $850.09.

I turn now to Huth's appeal submission: there were several arguments advanced. I will deal with the merits of those arguments and not the criticism of the delegate. First, the Company argued that Garbutt and Fleming signed agreements that set out their relationship with the Company as subcontractors. Garbutt signed her contract the day she started work. They did so "of their own free will."

Second, Fleming was caught several times not working. Huth argued that Fleming could not be fired or reprimanded. Huth was free not to give work to a contractor doing the work he was contracted to do.

Third, as subcontractors, Fleming and Garbutt understood the nature of the Company's business. The business gave them the opportunity to "sell their services to get other wholesale or retail business." This allowed them to perform extra work and earn extra commission.

Fourth, Huth noted that Fleming was seeking compensation for hours worked and vacation pay: Garbutt had not made those claims. Huth relied on this inconsistency in questioning Fleming's claim.

Addressing the factors applied by the delegate, Huth made the following points:

- Huth worked in the shop and booked jobs: Huth (as well as Fleming and Garbutt) could also perform the work on customer's cars.

- Huth acknowledged that a customer might assume Fleming and Garbutt were employees. He argued that was misleading. Garbutt and Fleming knew they were subcontractors and that they chose to work at the price quoted on the invoice.

- Huth noted that customers could approach Fleming and Garbutt. "While the customers have a brochure and menu of services they are of estimate only and can be regulated higher by the subcontractor."

- Huth argued that Fleming and Garbutt were required to bring in their own tools. The Company initially provided their tools to give them a break in getting started.

- Huth noted that the Company's relationship with Fleming and Garbutt depended on whether the quality of their work "was up to standard.".

- Huth says that Fleming and Garbutt were looking "for other business as they left Auto Pride for other employment."

- Huth argued that Fleming and Garbutt were allowed to subcontract out there work. They did contract out or share the work in order "to get the contracted job completed in a reasonable time period.".

- Huth reiterated his argument that Fleming took 10 to 12 hours to perform the kind of work that Garbutt completed in 3 hours. He could not be expected to pay Fleming an hourly rate when as a subcontractor, he had the freedom to waste such time. Fleming's record shows only the days he was on site.

- Finally, Huth argued that all subcontractors were treated the same way.

ANALYSIS

I will not reiterate the delegate's analysis, but it is a correct review of the Tribunal's jurisprudence.

The appellant has the onus to prove that a determination erred in its application of the *Act.* The appellant's written application must establish a *prima facie* case before a hearing will be convened. The Tribunal did not schedule a hearing into the Company's appeal. For the reasons that follow, I found that the Company's appeal submission did not establish a *prima facie* case.

An employer and its employees can not contract out of the *Act*. The relevant part of Section 4 of the Act reads:

> 4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect.

The *Act* did not permit Huth to sign contracts or have oral understandings with Fleming and Garbutt designating them as subcontractors if, in fact, the parties had an employee/employer relationship. While the contracts Huth had with Fleming and Garbutt are not ignored, they do not determine the issue. The issue is whether the substantive relationship between the parties demonstrated that they were independent contractors. Further, in examining whether Fleming and Garbutt are contractors, the issue is whether they were independent contractors. The term "independent" helps clarify the type of contractor excluded from the term "employee" under the *Act*. It should also be noted that the definition of employee and employer under the *Act* have been given a "liberal interpretation."

On-Line Services Inc. (BC EST #D319/97) sets out the question to be asked:

> The issue of whether a relationship is one of a contract of service (i.e., employment) or a contract for services (i.e., independent contractor) has traditionally turned on the degree of control that the party for whom the work is being done has over the activities of the party conducting the actual work. The courts have weighed four factors in assessing the nature and degree of control inherent in the relationship: the master's powers of selection of the servant, the payment of wages, control over the method of work, and the master's right of suspension or dismissal.

Fundamental to this case, the work performed by Fleming and Garbutt was the delivery of the detailing service offered by the Company. Their work was not ancillary. It was not work the Company performed from time to time. In fact, it was work that Huth also performed. It was work customers believed was being performed by employees. It would be a rare circumstance that a person would be found to be an independent contractor when the person works only at the Company's site and does only the work the Company "sells".

Huth made the point several times that the work being performed was wholesale work. He did not say why that was relevant. An employer offers a product or service to a particular

market(s); in this case it was detailing vehicles. That was the service the Company provided and the work Fleming and Garbutt performed.

It appears that Fleming in particular and Garbutt on occasion did not concentrate their efforts on the work. Huth argued that he exercised little control over Fleming and Garbutt. Huth chose not to closely supervise the work being done. With respect, that was his choice. More importantly, Huth acknowledged that he could withhold giving work to Fleming and Garbutt. Huth made it clear that if their quality of work was not satisfactory to him, their relationship would be terminated. In effect, Huth could suspend or terminate both Fleming and Garbutt.

Fleming and Garbutt looking for other work after working for the Company is not significant. It would only be significant if they had performed similar work on a contract basis at other locations while working for the Company: the Company did not suggest the occurred. Further, the "subcontracting" on site was amongst those who worked on the Company's site. I took that to mean one person helping another person get a job done.

Huth argued that Fleming and Garbutt could persuade customers to accept more work than originally requested. I accept that their pay would then increase. The Company's profits, however, would also increase. Fleming's and Garbutt's "profit and loss" was not independent of the Company's profit. This demonstrates the close integration of Fleming and Garbutt with the Company.

Fleming and Garbutt were paid on commission. They had the opportunity to upsale. They had the opportunity to make more money if they could convince the customer to pay for more work.. These conditions of employment do not show an independence from the Company. They show a method of payment integrated into the Company's business.

Huth argued that Garbutt did not seek compensation for wages. He said that cast doubt on Fleming's case. Huth's argument is not correct. The delegate concluded that Garbutt did not have the evidence to substantiate her claim for wages. Fleming did have credible evidence to support his claim for wages owed to him. The Determination was based on the evidence of the complainants.

The Company's appeal submission cast no doubt on the delegate's Determination.

ORDER

Pursuant to Section 115 of the *Employment Standards Act*, the delegate's Determination is confirmed.

Richard S. Longpre
Adjudicator