

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 -

Kenneth Dick
operating as Speedy Plumbing & Rooter

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton
FILE NO.: 98/085
DATE OF HEARING: May 22, 1998
DATE OF DECISION: June 9, 1998

DECISION

APPEARANCES

Kenneth David Dick	on his own behalf
Steven M. Cooper	on his own behalf
Gerry Omstead	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal under Section 112 of the *Employment Standards Act* (the “*Act*”) by Kenneth Dick against a Determination which was issued on January 19, 1998 by a delegate of the Director of Employment Standards. The Director’s delegate determined that Kenneth Dick operating as Speedy Plumbing & Rooter had contravened Section 17 and Section 58 of the *Act* and was required to pay \$1,030.97 to a former employee, Steven Cooper.

Mr. Dick’s appeal is based on several grounds: he has never operated a business under the name of Speedy Plumbing & Rooter; he did not employ Steven Cooper; and, the Determination names him incorrectly as a party to this matter. He seeks to have his name “...removed from the suit”.

A hearing was held in Victoria, B.C. on May 22, 1998 at which time evidence was given under oath or affirmation by Kenneth Dick and Steven Cooper.

FACTS

Mr. Cooper’s complaint under the *Act* caused the Director’s delegate to conduct an investigation. The Director’s delegate concluded that Mr. Cooper was employed as a plumbing technician and gave the following reasons to support his finding that Mr. Cooper was owed regular wages (\$980.00), vacation pay (\$39.20) and interest (\$11.77) as of the date of the Determination:

(Mr. Cooper) said that he drove a company truck, the company provided the parts and supplies for the jobs. He also indicated that the major tools he needed to do the job were supplied by the company. All the jobs were obtained by the company and he was sent by the boss, Mr. Ken Dick, to do the job. He said that when he was hired he negotiated a rate of \$25.00 per hour. Mr. Cooper indicated that the customers paid Speedy Plumbing Rooter for the work he performed and that all permits issued were issued to Speedy Plumbing & Rooter out of Saanich, B.C.

The company was notified of the complaint and a meeting was set-up to discuss the issues. Mr. Frank Haas attended the meeting and he said that Steven Cooper was not an employee of the company. He said that he was an independent contractor. Mr. Haas did not deny that Mr. Cooper worked for the company but felt that the Branch does not have jurisdiction. He said that Mr. Cooper stole equipment and parts from the company.

Mr. Cooper stated that the company did go to the police however the matter was dropped. He denies that he stole from the company.

I have reviewed all of the information provided to me in this investigation. Using the standard four fold tests I have determined that Mr. Cooper was an employee of the company. Mr. Cooper took direction from the company. The company provided the materials to do the jobs. The company obtained the jobs and the customers paid the company for the work performed. Mr. Cooper performed work that would normally be performed by an employee.

The amount in dispute is for the entire period of October 3 to the 17, 1997. The employer did not provide any payroll information with respect to the Demand for Employer Records that was sent to the company. Mr. Haas stated that the name of the company to which the Demand was sent was incorrect but refused to state what the correct name of the company is. Mr. Cooper stated that his boss and as far as he knows Mr. Kenneth Dick is the owner of the business.

Kenneth Dick is the president of Speedy Franchise Systems Inc. In making his appeal to the Tribunal, Mr. Dick gave the following reasons for his appeal:

- I have never operated any business in Canada operating under the name of Speedy Plumbing & Rooter.
- I have never employed Steve Cooper and had nothing to do with his dismissal.
- I feel I have been wrongly named in this suit.

He offered the following explanation for that submission:

My affiliation with the independent operations is as an employee of Speedy Franchise Systems Inc. I am one of numerous employees of this company. The only contact I have had with Mr. Cooper was when he purchased the rights to own the Speedy Plumbing and Rooter license for the Nanaimo area. I met Steve Cooper many times as his support in running that operation. Mr. Cooper since ceased to operate and legal proceedings are pending. To my knowledge, Steve Cooper never worked for the Victoria Franchise since his departure in early 1997 for Nanaimo.

The Tribunal also received an undated, unsigned document which stated that Mr. Cooper was "...an independent sub-contractor with the company according to the Franchise Agreement with Mr. Dick ...". Mr. Dick referred to a "Speedy Service Contract" (dated September 13, 1996) between Speedy Plumbing & Rooter Inc. and Steve Cooper. It appears that those arrangements came to an end in January, 1997 with the execution of a "Franchise Agreement" (dated January, 1997) between Speedy Franchise Systems Inc. and 509760 B.C. Ltd. and Steven/Allyson Cooper to operate a Speedy Plumbing & Rooter Franchise in Nanaimo, B.C. Mr. Dick testified that business failed during the summer of 1997 and Mr. Cooper returned to Victoria with his family sometime later.

Mr. Dick also testified that during November, 1997 he spoke to Frank Haas and asked him if he would employ Mr. Cooper as a plumbing technician. According to Mr. Dick, Mr. Haas agreed and Mr. Cooper began to work for Mr. Haas who was operating as a franchisee in premises leased to him by Speedy Franchise Systems Inc.

However, when questioned on this point by the Director's delegate, Mr. Dick testified that Mr. Haas "does not own a franchise" and "his franchise agreement was cancelled." He went on to explain that he had cancelled the franchise agreement with Mr. Haas early in 1998 and that he "...put someone from Vancouver" to operate the business. He declined to identify that person.

According to Mr. Dick's testimony, his only "direct affiliation" with Mr. Cooper was when he entered into the franchise agreement in January, 1997. At all other times, he submitted, he was acting as a friend to Mr. Cooper.

Mr. Cooper testified that after his business venture failed in Nanaimo, he returned to Victoria and, towards the end of September, 1997 he contacted Mr. Dick about employment and he started working for him that night. When questioned by the Director's delegate, Mr. Cooper testified that he was employed as a plumbing technician and was to receive 25% of all work invoiced which, in his mind, was equivalent to \$25.00 per hour. He also testified that Mr. Dick stored all the tools, equipment he used and the van he drove in a locked garage. According to Mr. Cooper, he only saw Mr. Haas a few times in Victoria and Vancouver, but Mr. Dick was actively running the business between 75% and 85% of the time that he was employed. There was no doubt in Mr. Cooper's mind that Mr. Dick was his employer.

ANALYSIS

As the appellant, Mr. Dick bears the onus of establishing, on the balance of probabilities, that the Determination should be varied or cancelled.

I have set out the evidence and testimony in chronological order. Where there is a conflict in evidence and the credibility of witnesses is an issue I must resolve such issues by adopting the test which the BC Court of Appeal set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BCCA):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. ...(pp.356-57)

When I review all of the evidence and submissions in this appeal I find that Mr. Dick employed Mr. Cooper as a plumbing technician. I make that finding for several reasons.

The terms “employee” and “employer” are defined broadly in Section 1 of the *Act*. An “employer” includes a person “...who has or had control or direction of an employee” and an “employee” includes, *inter alia*, “...a person an employer allows, directly or indirectly, to perform work normally performed by an employee.”

The Director’s delegate made two findings of fact which are at the centre of this appeal. I can find no ground to disturb the finding that Mr. Cooper was an employee or the finding that his employer was Kenneth Dick operating as Speedy Plumbing & Rooter. Mr. Dick’s testimony that Mr. Cooper was employed by Mr. Haas is not “...in harmony with the preponderance of the probabilities.” Mr. Dick’s testimony was contradictory on several points and, as I pointed out at the hearing, strained the limits of credulity. It simply is not reasonable that as president of Speedy Franchise Systems Inc. he cancelled the franchise agreement with Mr. Haas and yet he could not identify the person or persons who operated the business thereafter. Mr. Dick tendered no evidence to refute the findings made by the Director’s delegate nor the clear evidence by Mr. Cooper that he was employed by and under the direction of Mr. Dick. I note, also, that Mr. Dick’s oral testimony conflicts directly with his written submissions on one crucial point, namely the nature and frequency of their interactions with each other. In his submission of February 11, 1998 Mr. Dick stated:

“The only contact I have had with Mr. Cooper was when he purchased rights to own the Speedy Plumbing and Rooter license for the Nanaimo area. I met Steve Cooper many times as his support in running that operation. Mr. Cooper since ceased to operate and legal proceedings are pending. To my knowledge, Steve Cooper never worked for the Victoria franchise since his departure in early 1997 for Nanaimo.”

However, in his oral testimony, Mr. Dick explained how he made arrangements in November, 1997 for Mr. Cooper’s employment as a plumbing technician in Victoria. The “Speedy Service Contract” dated September 13, 1996 and the “Franchise Agreement” dated January 17, 1997 are not relevant to this appeal which is concerned only with the non-payment of wages to Mr. Cooper for the period October 3, 1997 to October 17, 1997.

ORDER

I order, under Section 115 of the *Act*, that the Determination dated January 19, 1998 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:bls