

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-

Ask The Weathergard Shop Ltd.
("Weathergard")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO: 97/338

DATE OF DECISION: June 13, 1997

DECISION

OVERVIEW

This is an appeal by Ask the Weathergard Shop Ltd. ("Weathergard"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued on April 9, 1997. The Director found that George Aucoin ("Aucoin") was an employee of Weathergard, and that Weathergard had contravened Section 17 of the Act in failing to pay him wages. The Director ordered Weathergard to pay \$1934.82 to Aucoin.

The appeal is being dealt with by written submissions.

ISSUE TO BE DECIDED

Whether Aucoin was an employee or a self employed contractor, and whether, if he was an employee, wages were owing.

FACTS

Aucoin worked as a telemarketer for Weathergard from October 1995 until September 1996 from an office provided to him by Weathergard.

The Director determined that since Aucoin received instructions from Weathergard on a daily basis, and that the company determined his salary, he was an employee.

During the investigation, the Director received a copy of Weathergard's 'Find report' indicating all transactions regarding Aucoin's remuneration. It was determined that Aucoin received earnings of \$280.37 (net) per week from October 1995 to July 1996, and \$320.88 from July 1996 to September 1996, with additional bonuses being paid. From this consistent amount being issued over time, the Director determined that Aucoin was paid regular wages of \$300.00 per week until July 1996, and \$350.00 per week until September 1996, with regular deductions being made. From this, the Director also concluded that Aucoin was an employee.

Aucoin claimed that he did not receive the last three bonuses. The Director relied on Weathergard's statement that these bonuses were paid in cash, and that no receipts were obtained, in arriving at his determination bonus payments were owing.

ANALYSIS

The burden of establishing that the Director's determination is in error rests with the Appellant. Having reviewed the submissions of Weathergard, I am not satisfied the decision is incorrect.

Weathergard took the position that Aucoin was a contract worker, not a salaried employee, and that he was not entitled to holiday pay. Weathergard argued that because Aucoin never had any deductions taken off his pay, he was a contractor. No evidence was provided in support of this argument, even though the Director came to a contrary finding.

Mr. Neuman also claimed that Aucoin was not an employee because he also performed work for another company at the same time he worked for Weathergard. This fact is not critical to the determination of Aucoin's status with Weathergard.

Weathergard also contended that Aucoin determined his own schedule, although he worked at the company office. Mr. Neuman further contended that Aucoin did not take direction from Weathergard. Mr. Neuman provided no evidence in support of these arguments.

Following his investigation, the Director found that Aucoin was an employee. This finding appears to have been based on his determination that Aucoin received instructions on a daily basis and that Neuman determined his salary. No evidence was submitted in support of Neuman's contention that this finding was in error.

In his April 29 letter of appeal, Mr. Neuman states that "monies paid out and designated bonuses were in fact "hardship funds" provided in his [Aucoin's] time of need so assigned for accounting purposes". This conflicts with his statement to the Director that the bonus was paid in cash, and no receipts were received. On a balance of probabilities, I accept that the payments were bonuses, and that none were paid after the initial three.

Consequently, I am unable to conclude, on the evidence submitted, that the Director's determination is incorrect.

ORDER

I order, pursuant to Section 115 of the *Act*, Determination #052951, dated April 9, 1997 be confirmed.

Carol Roberts
Adjudicator
Employment Standards Tribunal