

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 -

Eco-Fire Industries Ltd.
("Eco-Fire" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/177

DATE OF HEARING: June 8, 1999

DATE OF DECISION: July 7, 1999

DECISION

APPEARANCES

Mr. Henrik Kmetyk on behalf of the Employer

Ms. Carolyn Browne on behalf of herself

OVERVIEW

This is an appeal by Eco-Fire pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on March 1, 1999 which determined that Ms. Browne (“Browne”) was entitled to payments on account of regular wages, overtime and vacation pay. The Director’s delegate ordered Eco-Fire to pay \$2,257.63 to Browne.

ISSUE TO BE DECIDED

Eco-Fire takes issue with the findings and conclusions of the Director’s delegate. The basis for the appeal are:

1. Browne was not an employee of Eco-Fire. She was employed by a Mr. Ted Hamilton, the sales manager for Eco-Fire, who also operated a (separate) cellular telephone business.
2. Moreover, Browne did not work the days claimed as she was only in the office on certain days indicated in the Employer’s log.

Browne says that she worked the hours claimed and is entitled to be paid.

FACTS AND ANALYSIS

At the hearing, Mr. Kmetyk (“Kmetyk”) and Mr. Rybak (“Rybak”) testified for the Employer. Rybak is the Employer’s landlord and the previous owner of Eco-Fire. Rybak’s testimony was generally consistent with Kmetyk’s; but he was out of the country for most of the material time, between September 3 and October 5, 1998. In the result, he does not have much direct knowledge of the relationship between Browne and Eco-Fire.

Kmetyk is the president of Eco-Fire which is the distributor of gas and pellet stoves and fuel. He explained that Browne was hired by Hamilton, who was the sales manager for Eco-Fire, in August of 1998. Kmetyk says that she was not hired to work for the Employer, but rather to work for Hamilton's other business, selling (among others) parts for cellular telephones. Hamilton, who operated this business out of Eco-Fire's premises, was paid a salary of some \$1,300 every two weeks until the end of June 1998. After that time, as I understood it, Hamilton worked on a commission basis. Hamilton did not have the authority to hire on behalf of Eco-Fire.

Kmetyk says that he told Browne expressly--in front of witnesses--immediately following her hiring that she did not work for Eco-Fire. He says that he could not afford to hire a secretary/receptionist at the time, as he owed money to the landlord, who was also the former owner of the business, and, even if he could, he would not have hired someone--like Browne--without experience. He also states that he would not have agreed to pay her \$10.00 per hour because that was as much as he was paying Eco-Fire's technician, its "number one guy". Moreover, he explains that he had concerns about Hamilton and was concerned about her not getting paid for the work she was doing for Hamilton. Browne denies being told that she was not an employee of Eco-Fire. She says she was hired to work for Eco-Fire. The witnesses referred to by Kmetyk were not present at the hearing to confirm that Browne was told that she was not an employee of the Eco-Fire.

The Determination states that Browne worked from August 29 to October 8, 1998. It is clear from the evidence presented at the hearing that Browne did, in fact, perform "labour or services" for Eco-Fire. Browne says that her work, except for the last day or two, involved exclusively Eco-Fire. She submitted miscellaneous records of the work that she performed and notes of activities, including preparing daily activity plans for employees of the firm (on Eco-Fire stationary), cataloguing brochures, reviewing and working on Eco-Fire files, and preparing of customer lists and form letters. Kmetyk agrees that she typed some customer cards for Eco-Fire and that she did some "Eco-Fire stuff". Kmetyk says that he "knows that she did some work for Eco-Fire--but it was Ted (Hamilton's) work".

Kmetyk explains that Browne was not in the office on many of the days, including one Sunday, for which she was awarded compensation for wages and overtime. He introduced into evidence copies of his daily log which indicated, among others, when employees were in the office. Browne does not disagree that she may not have been in the office on those days. She explains that she sometimes worked out of the office, sometimes out of Hamilton's home, and sometimes out of her home.

It is trite law that the appellant, in this case Eco-Fire, the Employer, has the burden to persuade me that the Determination is wrong. While I have some sympathy for the Employer's position, as presented at the hearing, on the balance of probabilities, I am not satisfied that the Determination is wrong and should be set aside.

The definitions of an “employee”, an “employer” and “work” in the *Act* are broad. The definition of an “employee” includes “a person an employer allows, directly or indirectly, to perform work normally performed by an employee”. In this case, Browne clearly performed work “normally performed by an employee”. This work included preparing daily activity plans for employees of the firm (on Eco-Fire stationary), participating in meetings, cataloguing Eco-Fire brochures, reviewing and working on Eco-Fire files, and assisting in the preparation of customer lists and form letters. From the standpoint of the *Act*, it is not relevant that the work--“labour or services”--in question was performed outside the Employer’s premises. The Employer, while acknowledging that she did some work for Eco-Fire, says that she worked mostly for Hamilton on his cellular telephone business. Even if, as suggested by the Employer, that Browne was told at the outset that she was not an employee of Eco-Fire, if the Employer allowed her, directly or indirectly, to perform work for it, she could--based on what happened subsequently--nevertheless still become and be considered an employee for the purposes of the *Act*. What is clear is that Browne did perform work on Eco-Fire’s premises and this work was related to its business. Kmetyk acknowledges that she worked on “Eco-Fire stuff” and that “she did some work for Eco-Fire”. Browne says that she worked mostly for Eco-Fire. The documentary evidence tendered at the hearing confirms that she performed substantial work for Eco-Fire. Moreover, even if I accept that Hamilton may not have had actual authority to hire, he was clothed with some apparent authority as its “general sales manager”. If, as seems to be the case here, Kmetyk allows her to do “Ted (Hamilton) work”--in the context of Hamilton’s position--it is not unreasonable to conclude that she was an employee of Eco-Fire. If she did that work in some other capacity than as an employee, *i.e.*, for example, as an employee of Hamilton, Eco-Fire should have made that clear to her. Kmetyk says that he told her and she denies being told. The appellant bears the onus to prove the Determination wrong and, in the circumstances, I am not persuaded that it has met that burden.

With respect to the hours worked, the evidence is that the Employer is not, in fact, in a position to prove what the actual hours of work were. The Employer agrees that she worked on the premises on certain days. The Employer’s log indicates that on many other days she was not in the office. Browne agrees but says that she worked out of her home or out of Hamilton’s home. She says that she worked the hours claimed. In the circumstances, I am not persuaded that the Determination should be set aside on this point.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations in this matter, dated March 1, 1999 be confirmed.

**Ib Skov Petersen
Adjudicator
Employment Standards Tribunal**