

An appeal

- by -

Art Mechanics Inc. operating as Boz Film
("AMI")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2002/122

DATE OF HEARING: June 10, 2002

DATE OF DECISION: June 17, 2002

DECISION

APPEARANCES:

Richard Bullock, President/Director
& Toni Bullock, Secretary/Director

for Art Mechanics Inc.

OVERVIEW

This is an appeal filed by Art Mechanics Inc. operating as Boz Film (“AMI”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). AMI appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on February 18th, 2002 (the “Determination”). The Director’s delegate determined that AMI owed its former employee, Carmen Ruiz y Laza (“Ruiz y Laza”), the sum of \$4,807.65 on account of an unpaid commission and section 88 interest.

This appeal was heard at the Tribunal’s offices in Vancouver on June 10th, 2002 at which time I heard the testimony of Mr. Richard Bullock on behalf of AMI. Surprisingly, Ms. Ruiz y Laza did not attend the appeal hearing (nor did she contact the Tribunal to explain the reason for her absence). Similarly, no one appeared on behalf of the Director.

I should note at the outset that the appeal hearing was delayed to allow Ms. Ruiz y Laza to arrive late but after some fifteen minutes--and in the absence of any communication from her--I commenced the hearing. Thus, Mr. Bullock’s viva voce evidence is wholly uncontradicted and, in a matter where facts are disputed and the parties’ relative credibility is very much in issue, this appeal largely turns on my acceptance of Mr. Bullock’s apparently credible evidence.

THE APPEAL

AMI’s position, simply put, is that Ms. Ruiz y Laza never did the work she claimed to have done in order to qualify for the commission that was awarded to her by the Director’s delegate.

Apart from the foregoing--essentially factual--issue, it would also appear, based on the evidence before me, that Ms. Ruiz y Laza was not employed by AMI at the material time and thus is not entitled to advance a claim for unpaid wages against that firm.

Accordingly, I am allowing this appeal and cancelling the Determination.

BACKGROUND FACTS AND FINDINGS

AMI was in the business of, *inter alia*, producing television commercials. Ms. Ruiz y Laza was employed as a sales representative. In essence, her job was to bring production business to AMI. Ms. Ruiz y Laza was originally engaged as a salaried employee from mid-July to mid-November 1999 at which point her employment was terminated due to her poor sales performance and AMI’s straitened economic circumstances (one factor, of course, leading to the other). It should be noted that Ms. Ruiz y Laza never claimed (nor was she awarded) any unpaid wages for this initial period of employment.

A short time later, Ms. Ruiz y Laza approached AMI with the suggestion that she become a “pure” commission agent and this proposal was acceptable to AMI. Legally, at this juncture, Ms. Ruiz y Laza continued to be an AMI employee although AMI’s principals may well not have appreciated that fact. From their perspective, there was little financial risk associated with Ms. Ruiz y Laza’s proposal since her compensation was entirely contingent on her sales performance.

In any event, Ms. Ruiz y Laza continued as a commissioned employee but did not produce any sales during the ensuing months. The arrangement between the parties was that Ms. Ruiz y Laza would receive a commission (10% of AMI’s pre-tax profit subject to certain adjustments) on any production project that she brought into the company that ultimately resulted in AMI being awarded a television commercial production contract. During the next few months, and as recounted in the Determination, AMI obtained and completed three production contracts for three separate television commercials. In each case, this work was obtained by AMI solely through Mr. Bullock’s contacts and efforts. Nevertheless, for two of the commercials, AMI paid Ms. Ruiz y Laza a sum in the form of a commission.

AMI says that these payments were *ex gratia* payments made in recognition of Ms. Ruiz y Laza’s (albeit unsuccessful) efforts to bring business into the AMI fold. I do not necessarily accept that these two payments, totalling about \$4,600, were truly *ex gratia* payments given that Ms. Ruiz y Laza was an employee during this period who was, therefore, entitled to be paid at least the minimum hourly wage for all hours worked (see section 16 of the Act). Nevertheless, based on my understanding of Ms. Ruiz y Laza’s working hours during this period, the two payments exceeded AMI’s minimum statutory obligation by some considerable degree.

The television commercial that is in dispute here, namely, the so-called “Ameritrade” commercial, was filmed in Vancouver on or about July 28th, 2000. The contract for this latter production work was awarded to AMI a short time earlier. Based on the evidence before me, it appears that when this work was undertaken--and there does not appear to be any dispute that Ms. Ruiz y Laza did do some “work” in regard to this contract--she had ceased to be an AMI employee and had taken up employment with a new firm, Peace Arch Entertainment Group Inc. (“Peace Arch”).

Peace Arch entered into a form of “joint venture” agreement with AMI as of June 29th, 2000. Ms. Ruiz y Laza is specifically named in the joint-venture agreement; Peace Arch agreed to pay her “salary, benefits, parking and cellular telephone” and to pay “Commissions due to Carmen Ruiz-Laza [sic]...quarterly”. Ms. Ruiz y Laza entered into a formal employment agreement with Peace Arch on July 24th, 2000, however, in the recital to that agreement, Ms. Ruiz y Laza is described as being “presently employed” by Peace Arch.

While the evidence is not entirely clear, on a balance of probabilities, I am satisfied that when the contract for the Ameritrade commercial was concluded, Ms. Ruiz y Laza had already ceased to be an AMI employee and had commenced her duties with Peace Arch. I note, as well, that the production and related fees for the Ameritrade commercial were paid directly to Peace Arch and not to AMI which, in my view, solidifies the notion that this work was undertaken under the Peace Arch, rather than the AMI, umbrella.

If Ms. Ruiz y Laza has any claim for a commission in regard to the Ameritrade commercial, her claim lies with Peace Arch, not AMI. Indeed, there is letter before me, dated December 5th, 2000 from Peace Arch to AMI, wherein Peace Arch is enclosing payment--presumably in accordance with the joint-venture agreement--to AMI in regard to the Ameritrade commercial. In that letter, Peace Arch demanded (and obtained) an indemnity agreement with respect to any “commissions” that might be outstanding with

respect to the project. I, unlike the delegate, do not conceive this demand for an indemnity as being evidence of an employment relationship between Ms. Ruiz y Laza and AMI; rather, the indemnification demand reflects Peace Arch's concern (and a well-founded one, it seems to me) that it might be the party primarily liable to pay Ms. Ruiz y Laza and that is the reason why it sought an indemnity from AMI.

However, even if it could be said that AMI was the employer and that Ms. Ruiz y Laza was its employee during the material time period, the fact remains that Ms. Ruiz y Laza did not "earn" the commission in accordance with the agreement between herself and AMI (see Kocis, B.C.E.S.T. Decision No. D331/98). This work was generated solely through the efforts of Mr. Bullock, and not through the efforts of Ms. Ruiz y Laza. Although she did work on the project, that work--in the absence of any contractual agreement governing her compensation for these administrative/clerical tasks--can only be compensated based on the then-prevailing minimum wage. As noted above, in light of the evidence before me regarding her working hours, Ms. Ruiz y Laza received a good deal more than the minimum wage for all hours worked for AMI.

The appeal is allowed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

ORDER

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal