

An appeal

- by -

Kelowna Alarm Service Inc.
("Kelowna Alarm")

- 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: Cindy J. Lombard

FILE No.: 2001/152

DATE OF DECISION: May 25, 2001

DECISION

OVERVIEW

This is an appeal by Kelowna Alarm Services Inc. (“Kelowna Alarm”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination of the Director of Employment Standards (the “Director”) issued on January 25, 2001 (the “Determination”).

The Respondent, Susan Unger (“Unger”) worked for the Appellant company between June 9, 2000, and July 14, 2000, as a sales representative. Unger received no pay for the work done for the 76.25 hours that she says she worked. Unger also made no sales. She says that if she had sold any systems she would have been paid \$150.00 for the sale of each system. Kelowna Alarm takes the position that Unger was an independent contractor not an employee or in the alternative, if an employee that she did not work all of the hours she says that she worked.

ISSUES TO BE DECIDED

1. Was Unger an independent contractor or employee?
2. If an employee, did she work 76.5 hours and therefore due wages for those hours?

FACTS AND ANALYSIS

1. Was Unger an independent contractor or employee?

The onus is on the Appellant, Kelowna Alarm, to show that the Determination was wrong on a balance of probabilities.

The relevant provisions of the *Act* which define “employer” and “employee” are as follows:

Section 1

“employee” includes

- a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- c) a person being trained by an employer for the employer’s business,
- d) a person on leave from an employer, and

- e) a person who has a right of recall;

“employer” includes a person

- a) who has or had control or direction of an employee, or
- b) who is or was responsible, directly or indirectly, for the employment of an employee;

Some of the factors to be considered in determining whether a relationship is one of independent contractor or employer/employee are:

- a. Did Kelowna Alarm have control and direction of Unger?
- b. Who owned the tools of trade?
- c. Was Unger an integral part of the Kelowna Alarm business?
- d. Who had the change of profit and loss?

See for example, *Montreal (City) v. Montreal Locomotive Works Ltd.* [1947] D.L.R.6.

Based on the facts of this case, Unger was an employee of Kelowna Alarm for the following reasons:

- a. Kelowna Alarm had direction and control of Unger’s work and owned the tools of trade.

When Unger started with Kelowna Alarm, she was given a company jacket and pitch book. She partnered with another employee and sold Kelowna Alarm systems door-to-door. She was expected to attend a company seminar and dinner. She was an integral part of the Kelowna Alarm business.

- b. It was Kelowna Alarm who stood to profit if alarm systems were sold and to lose if they were not. In this case Unger sold no alarm systems.

2. If an employee, did she work 76.5 hours and therefore due wages for those hours?

Unger kept records of the hours she worked and those records are marked as Exhibit #1 for reference. Kelowna Alarm kept no records.

Section 28 of the *Act* provides as follows:

28. (1) For each employee, an employer must keep records of the following information:

- a) the employee's name, date of birth, occupation, telephone number and residential address;
- b) the date employment began;
- c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
- d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
- e) the benefits paid to the employee by the employer;
- f) the employee's gross and net wages for each pay period;
- g) each deduction made from the employee's wages and the reason for it;
- h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;
- i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
- j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.

(2) Payroll records must

- a) be in English,
- b) be kept at the employer's principal place of business in British Columbia, and
- c) be retained by the employer for 5 years after the employment terminates.

Given the complete omission of Kelowna Alarm to keep any records whatsoever it was reasonable for the Director to rely on the records of Unger.

According to the *Act* the employer Kelowna Alarms must pay at least minimum wage for the hours worked and cannot contract out of the minimum requirements of the *Act*. The relevant Sections of the *Act* are as follows:

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, subject to sections 43, 49, 61 and 69 (collective agreements)
16. An employer must pay an employee at least the minimum wage as prescribed in the regulations.

SUMMARY

The onus is on the employer to show that the Director's Determination is wrong. The employer has not satisfied that onus for the reasons outlined above.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination with respect to the Respondent be confirmed as issued in the total amount of \$562.29 plus whatever further interest that has accrued pursuant to Section 88 of the *Act*.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal