

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 -

Steamers Pub Inc.
(" Steamers ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE No.: 2000/272

DATE OF HEARING: July 14, 2000

DATE OF DECISION: July 24, 2000

DECISION

APPEARANCES:

On behalf of Steamers Pub Inc.:	Andrew Wickens, L. Alan Wickens
On his own behalf:	Nicholas Ford
On behalf of the Director:	No one appeared

OVERVIEW

This is an appeal by Steamers Pub Inc. ("Steamers"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued March 15, 2000. The Director found that Steamers had contravened sections 34, 36, 45 and 58 of the Act in failing to pay Nicholas Ford ("Ford") wages, vacation pay and statutory holiday pay, and Ordered that Steamers pay \$5,647.12 to the Director on Ford's behalf.

ISSUE TO BE DECIDED

Whether the Director erred in determining that Ford was an employee, rather than a contractor. If Ford is a contractor, no wages, vacation pay, or statutory holiday pay is owed to him.

FACTS

Ford filed a complaint with the Employment Standards Branch on January 7, 1999 contending that had not been paid minimum wage. The Director's delegate investigated the complaint, and made a Determination on March 15, 2000.

There was no dispute over the material facts, which are as follows.

The Wickens' acquired Steamers Pub in July, 1995. Ford was initially hired as a guest room employee, and performed duties in accordance with that position until the summer of 1996, when Steamers lost its janitorial services. Ford then assumed the duties of janitor. A document drafted by Steamers setting out the job requirements closed with the following paragraph:

All of the above duties will be performed as noted by Nicholas Ford in contract to STEAMERS PUBLIC HOUSE (Andrew Wickens) for the sum of \$900.00 monthly to be paid in two instalments on the 15th and the last day of every month. This contract commences as of Aug. 1st, 1996.

Ford performed the janitorial duties from the summer of 1996 until November 1998, when he quit due to illness. The janitorial work was performed between the hours the Pub closed, and the

time it opened. He was paid \$900.00 per month starting September 1996, and \$950.00 per month effective May 1998.

After analyzing the evidence, the delegate concluded that Ford was an employee.

The Director was unrepresented at the hearing. The delegate indicated that he would be out of town, and that he had already had extensive discussions with the parties.

Andrew Wickens contended that he had one brief meeting with the delegate about the complaint. He stated that he never provided any documents to the delegate, because he was not asked to. He stated that he made several telephone calls to the delegate to discuss issues arising out of the meeting, and was under the impression that the delegate was still investigating the complaint. It was Andrew Wicken's evidence that the delegate said "I'll get back to you", or words to that effect, and that the Determination, when it was issued, came as a surprise.

The Tribunal has held on many occasions that it will not accept evidence at a hearing which ought properly to have been put to the Director's delegate at first instance. (see *Kaiser Stables BC EST #D058/98*, and *Tri West Tractor Ltd. BD EST #D268/96*). However, I am not satisfied that the delegate obtained the evidence necessary to make a proper determination, and I allowed new evidence on appeal, specifically, the janitorial contracts Steamers had in 1996 and after November 1998, and Ford's Income Tax returns.

I accept there were some discussions between Ford and Andrew Wickens regarding his pay, since, upon taking on the duties of janitor, Ford's cheque no longer included deductions for things such as income tax or UIC. Wickens says that Ford was apparently concerned that he was not being paid enough, and Wickens explained that no deductions were being taken off his pay, and that it was more advantageous to him.

Ford says he was not happy with this arrangement, but that he could not find any other work to do, so he continued to do it for two years. It was his evidence that at some point in 1996 or early 1997 he went to the Employment Standards Branch to discuss his situation, and he was advised not to file a complaint at that time because his employer might take retaliatory steps against him, and to wait until he finished his work to do so. Ford could not provide any corroborating evidence that he had indeed received this advice. In any event, Ford continued to work according to this arrangement until he quit.

The evidence is that Steamers always contracted out their janitorial services, and the janitorial work had never been done by an employee. The contract of H. & R. Janitorial Services from January 1996 at a rate of \$715.00 per month including supplies, and several quotes from companies dated November 1998 at rates of \$900.00 per month plus supplies, were submitted with the appeal. Ultimately, the evidence is that After Hours Janitorial Service was awarded the contract in 1998 after Ford quit, and it continues to perform the service.

ARGUMENT

Steamers argues that Ford was a contractor, according to the *Act*, having bid on the position successfully. It says that Ford was free to chose when to do his work during the hours the Pub

was closed, he had his own keys and alarm code to enable him to come and go as he needed, he was not supervised, he was free to engage in other employment, he was never treated as an employee, and that, prior to Ford's tenure as janitor and after he quit, the janitorial services were performed by contractors. Steamers kept no record of Ford's hours.

Ford argued that he was provided with a list of duties to complete, that he worked exclusively for Steamers, and that Steamers provided all the supplies and equipment. Ford also contended that he was offered the position of Janitor, and that he did not bid on it. I accept that there was no formal bidding, but that because Ford was a friend of the family, he was offered the opportunity to do the job.

Andrew Wickens contended that Steamers treated Ford as a contractor, and in turn, Ford acted as a contractor. Steamers also contends that Ford represented himself to Revenue Canada as a contractor.

Although other submissions were made as to Ford's motivation for filing the claim, and his truthfulness in dealing with the Employment Standards Branch, I find that those matters are only peripherally relevant to this appeal and have not addressed them. Similarly, I find that whether or not Ford is currently on welfare irrelevant to the issue to be decided, and denied Mr. Wickens the opportunity to pursue his line of cross-examination in this respect.

Steamers argues that, provided that the premises were cleaned to Steamers' satisfaction, the way the work was done was up to him. It contends that the "list of duties" provided to him was given to all contractors, so that they know what work Steamers expected them to do when submitting a bid.

Steamers also contends that Ford was free to hire anyone else to perform his work, although he did not do so. Mr. Wickens argued that Ford chose not to because he told him that "he could not afford to", suggesting that he was aware of the chance of profit and risk of loss.

Steamers concedes that it provided Ford with all the necessary tools to do the job. Mr. Wickens stated that, as Ford was a friend of the family, they were aware that Ford did not have his own vehicle, and that it would have been impossible for him to transport the equipment. However, Mr. Wickens stated that Steamers needed the cleaning tools and supplies for Pub use during the day in any event, and argued that to have the janitorial services duplicate the equipment was wasteful, and unnecessary. Further, Mr. Wickens argues that it is common practise in the Janitorial Service Industry for the establishment to either provide equipment and supplies as a way to control costs and avoid abuse of supplies and equipment, or pay a premium to the contractor to provide them.

Finally, Steamers argues that Ford had the chance of profit and risk of loss, since he was free to employ someone else to do the work required, and the fact he chose not to, was entirely his choice.

Steamers argues that, according to the preponderance of the evidence, Ford was an independent contractor, not an employee, and that the determination should be cancelled.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has been met.

Section 1 of the *Act* defines employee to include

- (a) a person....receiving or entitled to wages for work performed for another, and
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee.

An employer is defined as including 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.

Work is defined as meaning "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."

I accept that, when Ford sought, and was granted the position of Janitor, he was aware that he would be a contractor. The evidence is that Ford has some post-secondary school education. Although the word "contract", rather than "employee" was used in the document, I accept that Ford may not have fully appreciated the distinction between them. Indeed, I am not certain the Wickens' did either. Nevertheless, that there was a change in Ford's status with Steamers was, or ought to have been apparent to him, as his method of pay changed, and he no longer had deductions, or received T-4 slips. The fact is that Ford reported his income as "other income" on his Income Tax returns. However, I do not accept Ford's explanation that, while he found the lack of deductions "confusing", he "assumed it was something management was doing to evade taxes...or something of that sort. I didn't want to 'rock the boat', so I didn't really discuss it much."

How parties define their relationship is only marginally relevant to determining whether the relationship is one of employer - employee or not. The *Act* defines what an employee is, and if the relationship is found to fall within that definition, the parties will be bound by the requirements of the *Act*.

Several common law tests have evolved to determine whether a person is an employee or an independent contractor. I have considered several of those tests, including the control test, along with the definitions noted above, and find, on balance, that Ford was a contractor.

One of the common law tests, and the definition in the *Act*, centre on the issue of control or direction of an employee. The Control Test involves an examination of the degree of control, the ownership of tools, the chance of profit and the risk of loss.

Although Steamers owned their own janitorial tools, I accept the evidence that it would need most cleaning supplies and equipment for its own use during the day. Pubs are business in which drinks get spilled, tables need to be wiped regularly, and glasses get broken. Most of the

janitorial supplies and equipment would already be on site, and I find this factor to be of less importance given the nature of this business. I find that it was not unreasonable for Steamers to have their own in this business in any event, and to provide those tools to Ford as an exercise in cost control.

Ford did assume a chance of profit. The fact is that he was given a prescribed job to do, which could have been performed between the time the bar was closed and the time it opened. I accept that, for the most part, this was between approximately 2:30 a.m. and 11:00 a.m. most days. Therefore, Ford had approximately 8 hours to clean the bar. I accept that it rarely took him 8 hours. In fact, his own records disclose that he took, on average, somewhere between 2.5 to 3.5 hours during week days, and, on average, 4 to 5 hours on weekends. Ford had the ability to work for another employer or business, had he so desired. The fact he worked only for Steamers does not suggest that he was an employee, as found by the delegate. It only suggests that he chose not to work for anyone else. The fact that he was economically dependent on Steamers was his own choosing. I also accept that Ford was free to hire others to work with him, or instead of him, and chose not to.

How Ford carried out his work was relatively within his control. Although he had a prescribed time within which the cleaning had to be done, and had a list of things that Steamers expected that he do, he arrived at the Pub according to his own schedule, had his own keys, and was not supervised in the performance of those duties.

Although certain job requirements were set out in a list, I do not find that list to constitute Ford's duties. The establishment of required duties is not an unusual feature of a contract. I would anticipate that most experienced janitorial services would be aware of most job requirements. Nevertheless, that those are set out would assist any cleaning company in the bidding process. Furthermore, because Ford had not performed that service before, it was not unreasonable for Steamers to set out its expectations for him.

I find that Ford was not functionally integrated into Steamers' operations. He attended no staff meetings, did not work with any other staff, and was not involved in selling any of Steamer's products.

As this Tribunal has stated in a previous decision, the common law tests of employment are subordinate to the statutory definition (*Christopher Sin BC EST #D015/96*). The statutory definition of employee contained in the *Act* is inclusive, not exhaustive.

Thus, the overriding test is whether Ford "performed work normally performed by an employee," or "performed work for another." The Tribunal has held that the definition is to be broadly interpreted: (*On Line Film Services Ltd. v Director of Employment Standards BC EST #D319/97*).

Ford performed work which was substantively no different than that performed by contract janitorial services both prior to his "hire" and subsequent to his quitting. Although Ford contended that he had spoken with a person who was cleaning the Pub before he was hired and that he failed to describe himself as a contractor, nothing turns on this, as I accept Ford has no knowledge of the business affairs of Steamers.

I find that Ford worked independently of other employees, and did not perform the same work in the same manner as any other worker did. Further, he worked with little direction and no control.

On balance, I conclude that Ford was a contractor, and allow the appeal.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination dated March 15, 2000 be cancelled.

C. L. Roberts
Adjudicator
Employment Standards Tribunal