

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-

Partel Towing and Recovery Ltd.
(the "Appellant")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	E. Casey McCabe
FILE No.:	98/204
DATE OF HEARING:	May 26, 1998
DATE OF DECISION:	July 8, 1998

80% of her hours at her home. The complainant claims that the employer failed to pay her for an invoice dated May 20, 1997 in the amount of \$2,287.50 and a further invoice dated June 16, 1997 in the amount of \$112.50 for a total outstanding as of June 16, 1997 of \$2,400.00. The complainant testified that she invoiced the employer for these amounts. She also testified that she would invoice the employer on an irregular basis for the hours that she had worked.

The employer testified that the complainant kept her own time records therefore he was not in a position to dispute the time on her invoices because he had no knowledge of the amount of time she actually worked. The employer acknowledges that he owed the complainant some money for her services but disputed the amount. However the employer was not able to state a figure at the hearing that he felt was an appropriate amount for the work that the complainant had performed. Furthermore the employer felt that he had not been treated fairly by the complainant because the complainant had withheld certain bookkeeping records in her possession from the employer and his accountant. This caused the employer to be late in filing certain tax remittances. The employer was not taking the position that he should be allowed to deduct from the wages owing the complainant the amount of money he had to pay his accountant for the extra efforts the accountant had to make in order to file the respective tax returns but he did feel that the complainant, in withholding the financial records and materials, contributed to delay in the filing of the tax returns which prejudiced to the employer. This the employer felt was unfair.

It should be noted that the complainant has surrendered all of the materials and records in her possession to the Employment Standards Branch. The Director's delegate reviewed that material along with other information that was provided by the complainant and considered that material in his deliberations. It should further be noted that the employer, according to his testimony, made one effort to speak to the Director's delegate and, being unable to reach him by telephone at that time, did not make any further attempts to return calls.

ANALYSIS

At the hearing the employer raised the complainant's status as an employee as an issue. The employer took the position that she was an independent contractor rather than an employee. The employer stated that he did not pay her a regular wage but rather viewed the \$15.00 per hour agreement as a contract. He stated that although he had a computer at his office that the complainant initially used he acknowledged that his equipment was old and he was not surprised that the complainant preferred to use her own computer. He stated that the arrangement for her to work Tuesdays and Thursdays was to suit her schedule rather than his. He testified that he was not knowledgeable nor interested in the paperwork of his business and accordingly left that aspect of the record keeping to the complainant and others.

I am not able to accept the employer's argument that the complainant is not an employee. Even though I disagree with the merits of the employer's argument on this point the greater

problem the employer faces is that the argument was raised for the first time on appeal. The Tribunal has a long-standing policy of refusing to entertain new issues on appeal. It is the type of issue that could have and should have been raised with the Director's delegate at the investigation stage. For this reason I dismiss this ground of appeal by the employer.

The employer also disputes the amount of the Determination. However, the employer did not provide any information to the Director's delegate or the Tribunal to challenge the invoices submitted by the complainant for the work that she had done. The employer did raise the argument that because the complainant would not return the books on the grounds that he still owed her money the employer could not challenge the calculations. However, the Director's delegate had determined, upon a review of the books and records deposited with him by the complainant, that there was no information in those records that assisted him in determining the amount of work that had been performed. The Director's delegate based his decision on the information that was available to him which included copies of the invoices which had been submitted to the employer. He concluded that the complainant was entitled to payment of her invoices plus vacation pay at 4% and interest. In other words the Director's delegate based his decision on the same information that was otherwise available to the employer. He was not privy to information not available to the employer with respect to the complainant's claim. There is no basis to overturn his conclusions.

ORDER

I confirm the Determination dated March 11, 1998.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal