

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Tony Bennett Operating as Elite Interiors
(“Bennett”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/425

DATE OF HEARING: November 26, 1996

DATE OF DECISION: December 9, 1996

DECISION

OVERVIEW

The appeal is by Tony Bennett operating as Elite Interiors pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against Determination No. CDET 003043 of the Director of Employment Standards (the “Director”), a decision dated June 26, 1996. Michael A. Janowski has been found to be owed wages, minimum daily pay, vacation pay and overtime pay.

The appeal alleges that Janowski was engaged as an independent contractor, not an employee, and it argues as well that the Determination fails to take into account all moneys paid Janowski.

APPEARANCES

Anthony Bennett

Representing Elite

Lynne L. Egan

For the Director

FACTS

Janowski did painting work for Elite from February 12, 1996 to March 18, 1996.

Bennett, operating as Elite Interiors, works as a painter, bidding work on both a fixed price and hourly rate basis. In the period in question Janowski painted projects for Elite. Janowski supplied his own tools. As Janowski did not have a vehicle, Bennett often drove Janowski to and from jobs. Bennett deducted money for gas and WCB premiums from what he paid Janowski.

The Director’s delegate found that Bennett is in the painting business, that Janowski was hired as a painter and that Janowski’s work was an integral part of Bennett’s business. As such their relationship was found to be one of employment and covered by the *Act*. Janowski was found to be entitled to wages, minimum daily pay, vacation pay and overtime, an amount of \$1,622.11 including interest. The deductions for gas and WCB premiums were found to contrary to section 21 of the *Act*.

In appealing the Determination, Bennett argues that Janowski was not an employee but an independent contractor engaged from time to time. Bennett says he has no employees. Bennett says that he and Janowski operated separate businesses, Bennett operating as Elite and Janowski as Top Gun Painting and also Michael J. Painting. According to Bennett, when one had too much work, it was to turn to the other for assistance. That arrangement, he says, is how Janowski came to be paid by Elite for work, and it was to have led to Elite’s performance of work for Janowski but did not, Janowski never obtaining any work which required Elite’s assistance.

Bennett says that Janowski had a business licence, that he supplied his own tools, often bought his own paint and supplies, set his own hours and was free to hire others for work. He says that Elite deducted neither income tax, UIC premiums, nor CPP premiums from what it paid Janowski. Bennett says that Elite paid WCB premiums on behalf of Janowski because Janowski was unable to register with the WCB, a matter with which Bennett's wife was assisting Janowski. And, according to Bennett, jobs were bid on a set price basis and turned over to Janowski on a percentage basis.

In respect to the matter of whether Bennett owes Janowski any money, Bennett says that he paid Janowski much more than the amount shown in the calculation schedule of the Director's delegate. It is the testimony of Bennett that a number of cash advances were paid Janowski as well and that cheques totalling another \$800 were issued Janowski. The record of cash advances consists of a series of notations by Bennett in a day book. Bennett submitted copies of cancelled cheques which show that another \$800 was paid to Janowski. It is the view of the Director's Delegate that the latter should be accepted as wages paid during the review period and that the Determination should be reduced accordingly.

ISSUES TO BE DECIDED

The issue is, Did Janowski work for Elite as an employee or an independent contractor?

Should Janowski be found to have been an employee, there is then a need to determine the amount owed Janowski.

ANALYSIS

Section 1 of the *Act* defines employee, employer and work as follows:

"**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 the 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.

"**work**" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

The above definitions are to be given a liberal interpretation. That is the view of the BC Court of Appeal. In *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170 the court noted that:

“the definitions in the statute of “employee” and “employer” use the word “includes” rather than “means”. The word “includes” connotes a definition which is not exhaustive. Its use indicates that the legislature casts a wide net to cover a variety of circumstances.”

The BC Supreme Court has noted that:

“The courts, in determining the nature of a labour relationship, have looked beyond the language used by the parties in the contract and have, instead, assessed the nature of their daily relationship”

[*Castlegar Taxi v. Director of Employment Standards* (1988) 58 BCLR (2d) 341]

In *Castlegar Taxi*, Mr. Justice Josephson referred to the following passage of a decision by Paul Weiler, then Chair of the Labour Relations Board of BC,

“The difficulty is that there is no single element in the normal makeup of an employee which is decisive, and which would tell us exactly what point of similarity is the one which counts. Normally, these various elements all go together but it is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee ... But while the legal conception of an employee can be stretched a fair distance, ultimately there must be some limits. It cannot encompass individuals who are in every respect essentially independent of the supposed employer.”

[*Hospital Employees' Union, Local 180 v. Cranbrook & District Hospital*, (1975) 1 Can. LRBR. 42]

Various tests are of aid in deciding whether a relationship is one of employment. As set out in the decision of the Tribunal, **Larry Leuven** (1996) BCEST # D136/96, the Tribunal will consider several factors including:

- Control by the employer over the work;
- ownership of tools;
- chance of profit/risk of loss;
- remuneration of staff;
- discipline/dismissal/hiring;
- perception of the relationship;
- intention of the parties; and
- integration into the employer’s business.

Applying the above to the evidence presented, it is my conclusion that the relationship between Bennett and Janowski must be viewed as one between an employer and an employee. There is evidence to suggest a relationship between independent contractors. Bennett genuinely believes that he engaged Janowski as an independent contractor, Janowski provided his own tools and no deductions were made by Elite for income tax. But other evidence points to Janowski as an employee. I refer to his perception of his status, the fact that the work performed by Janowski is work normally performed by an employee, the integrated nature of the work in terms of Bennett’s

business, the fact that Janowski did not have a vehicle, and the evidence that he was not registered with the WCB. Beyond that, Janowski is alleged to have run a contracting business, to be open to profit and loss and to have had a business license but there is no hard evidence to support the allegations. And I note that there is nothing of the usual residue of documents which is left as construction is subcontracted, no contracts, no invoices. Bennett may have assumed that he had engaged Janowski as an independent contractor but in proceeding as he did, rather casually in terms of keeping records, he is now unable to show that his relationship with Janowski was clearly one between independent contractors. As it is not clear that the relationship was of that type, I must view it employer/employee, charged with the responsibility to apply the *Act* as I am.

I now turn to the matter of what wages are owed Janowski. Bennett is unable to prove that cash advances were made, he having only notes in a day book on which to rely. He is, however, able to show that he paid Janowski more than the amount set out in the calculations of the Director's delegate, another \$800. On being presented with this new information, the Director's delegate indicated that she thought that the Determination should be reduced by that amount. I agree and order it so.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination # CDET 003043 be varied. The total amount payable is reduced to wages and vacation pay of \$792.39 and interest in the amount of \$14.79, a total of \$807.18.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

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