

An appeal

- by -

Darlene F. Grey operating as Roadrunner Courier

- 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: John M. Orr

FILE No.: 2002/285

DATE OF DECISION: August 12, 2002

DECISION

OVERVIEW

This is an appeal by Darlene Grey (“Grey”) pursuant to Section 112 of the Employment Standards Act (the “Act”) from a Determination dated May 02, 2002 by the Director of Employment Standards (the “Director”).

In the exercise of its authority under section 107 of the Act the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

Grey operated a courier delivery service and Leslie Wilson (“Wilson”) was a delivery driver. At the time that Wilson terminated his employment there were wages outstanding. A determination was issued by the Director for these outstanding wages together with vacation pay and interest.

Grey has appealed. In her appeal she alleges that Wilson was not an employee but an independent contractor and therefore there was no jurisdiction for the Director to issue a determination.

ISSUES

The issues in this case are whether the worker was an employee and whether the employer may raise this issue for the first time at the appeal.

ANALYSIS

Grey does not dispute that most of the \$4,065.24 amount determined to be owing is in fact owed to Wilson. She disputes that vacation pay (\$283.10) and interest (\$106.08) should have been included. However she submits that Wilson was an independent contractor and not an employee. She submits that a contractor should not be able to use the office of the Director as a collection agency.

Grey raised the issue about Wilson being a contractor for the first time in the appeal. The Tribunal has decided on a number of occasions that the employer must raise such issues with the Director during the course of the investigation. The Tribunal will not necessarily foreclose a party to an appeal from bringing forward evidence that was not available at the time of the investigation or addressing an issue that has arisen in the determination that they may not have reasonably foreseen: *Re: Kaiser Stables Ltd.*, BCEST #D058/97. However, the employment status of Wilson was clearly in the mind of the employer at the time that Wilson was hired and no explanation is given in the appeal documents as to why this issue was not raise with the Director’s delegate during the course of the investigation.

It would be inappropriate and contrary to the fundamental principles of the legislation to allow the employer to raise this issue for the first time on appeal.

Although this appeal does not succeed because of the failure of the employer to raise the “contractor” issue in a timely manner I would have concluded, based on the evidence presented, that Wilson was in law an employee. It is often the case that both employers and employees try to structure the working

relationship by entering into a form of contract that purports to define the worker as an independent contractor. However, the Director and the Tribunal must look to the reality of the relationship to see if the worker is indeed operating his own business. In this case, even accepting the evidence from the employer, it is pretty clear that the work was controlled and directed by Grey. There are very few indicators that Wilson truly an independent businessperson.

In any case, the appeal will be dismissed and the determination confirmed because of the failure of the appellant to raise the issue during the course of the investigation.

ORDER

I order, under section 115 of the *Act*, that the determination dated May 02, 2002 is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal