

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 -

Barbara Lyons operating as Canadian Car Care
("Lyons")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/352

DATE OF HEARING: August 23, 1999

DATE OF DECISION: September 16, 1999

DECISION

APPEARANCES

Barbara Lyons	on behalf of Barbara Lyons operating as Canadian Car Care
Clark Erfle	on behalf of Barbara Lyons operating as Canadian Car Care
Sheila Mills	on behalf of Barbara Lyons operating as Canadian Car Care
Toni Chernesky	observer
Kelsey Roder	on her own behalf
Linda Roder	observer

OVERVIEW

This is an appeal by Barbara Lyons operating as Canadian Car Care (“Lyons”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated May 12, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). Lyons alleges that the delegate of the Director erred in the Determination by concluding that Kelsey Roder (“Roder”) was an employee and was owed wages in the total amount of **\$1,221.15** (includes interest).

ISSUES

The issues to be decided in this appeal are:

1. Was Roder an employee as defined by the *Act* ?
2. If Roder was an employee, what are the wages owed ?
3. Did the delegate of the Director properly impose a zero dollar penalty on Lyons ?

FACTS

The following facts are not in dispute:

- Lyons operates a vehicle cleaning and detailing business;
- Roder performed work from September 24 - October 22, 1998;
- Lyons kept no records with respect to hours worked by Roder each day;
- Roder received a total of \$212.00 from Lyons for work performed;
- Roder performed work using materials and tools provided by Lyons;
- Lyons calculated payment to Roder based on a 'piece work' basis;
- Lyons told Roder and others on a regular basis that they had to work harder to ensure that their earnings were higher than minimum wage;
- Lyons advised Roder after each job that if she (Roder) didn't average a rate of minimum wage per piece, she (Lyons) would have no choice but to let her (Roder) go;
- Lyons would solicit the work which was then performed by Roder and others;
- the customers would pay Lyons for the work performed;
- Lyons would assign the work to Roder and the others;
- Lyons advised Roder what each job would pay, (ie. trunks=\$5.00, complete interiors=\$20.00)
- on a couple of occasions, Roder accompanied Lyons on a 'mobile service' call;
- Lyons required Roder and the others to keep track of the work performed on a daily 'rough tracking sheet';
- Lyons would meet with Roder and the others prior to payday to review the rough tracking sheets in order to ensure that only one person was invoicing for the work performed;

Lyons, Clark Erfle ("Erfle") and Sheila Mills ("Mills") testified on behalf of Lyons. I will however, only review the evidence which is relevant to the issues before this panel.

Lyons testified that:

- business was slow and she already had two workers doing piece work when Roder approached her about work;
- she advised Roder that there were no set hours or jobs;
- Roder often started a job which was then finished by others;
- she considered that Roder made minimum wage if the time taken to do a specific job divided into the money earned for that job was equal to or better than minimum wage;
- most jobs Roder performed generated more than minimum wage for the work performed;

- she did not feel that she had to pay Roder just to stand around when there was no work to do as Roder was free to leave whenever she wanted;
- Roder was not required to report for work at a set time, she was only required to check in to see if any work was available;
- Roder's record of hours is not correct as the shop was not open at 8 a.m.;
- Roder left early most days;
- Roder and the others would take their breaks whenever there was no work available;
- on one occasion Lyons picked up Roder at home at 11 a.m. and on another occasion, Roder did not work at all;
- any damages done to a customer's vehicle was the responsibility of the worker;
- after 1 1/2 - 2 months, most workers have put together the equipment necessary to be mobile because mobile service was Lyons' goal;
- most of the work is by appointment, they have very little 'drive up' business;
- she has contracts with some automobile dealerships;

Erfle testified that:

- he worked for Lyons during the period that Roder worked there;
- he would try to get into work by 8:30 a.m. and sometimes Roder would be there when he arrived;
- if work was left over from the previous day they would start right away;
- if no work was available right away, he would fill chemicals, do paperwork and wait around to see if work would show up;
- usually if no work came in by 9 a.m., phone calls would be made to try to get work;
- Roder would leave early, usually around 4 p.m. but the odd time she stayed till around 5 p.m.;
- Lyons would constantly remind all of the workers of the need to work fast enough to make minimum wage;
- he recalls Lyons saying that if a person didn't make at least minimum wage, that person would have to be let go;
- he didn't have to come in, he could have just phoned in to check if work was available and then he could go home when the work was done;
- he would keep track of the jobs done on the tracking sheets;
- he does recollect one day when they worked 12 hours;
- on most days the shop closed around 4:30 p.m. although they would stay until the job was finished;

Mills testified that:

- she has been a longtime customer of Lyons;

- on one occasion she came in to get her car cleaned and noticed a young girl standing around for quite some time;
- it was only later that she was advised by Lyons that the young girl was Roder and was supposed to be working.

Roder testified that:

- on the day she was hired, she walked down to the shop and another worker (Steve) asked Lyons if she wanted someone to do interiors and Lyons said yes;
- she was not told to call to check for work, she would come in;
- most days she waited for her boyfriend to pick her up from work and he worked until 5 p.m.;
- on some occasions she would catch a ride home with Steve;
- Lyons was rarely around the shop;

Under cross examination by Lyons, Roder testified that:

- she was at work till 5:30 p.m. as her boyfriend did not get off work until 5 p.m. and she would wait for him to pick her up;
- she did not leave early on a regular basis;
- she was required to submit her invoices at least two days before pay day;
- the only day she left early was the day she quit.

In response to questions from the panel, Roder testified that:

- she usually wrote hours down on her calendar when she got home from work;
- there were a few occasions when she had to wait for work to come in but usually just a short time, not waiting for hours.

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, Lyons.

At the outset, I should note that I am in complete agreement with the delegate of the Director's analysis of the issue in terms of the common law (four-fold) test. Had I been called upon to address the status of Roder under the common law, I would have arrived at the very same conclusion for the very same reasons set forth in the Determination.

However, I need not even concern myself with the question of the status of Roder under the common law in the face of the statutory definitions contained in Section 1 of the *Act*. The *Act* casts a somewhat wider net than does the common law in terms of defining an "employee". Of particular interest are the definitions of "employee", "employer", "wages" and "work" that are found in Section 1 and set out below:

"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;*

"wages" includes

- (a) salaries, commissions or money, paid or payable by an employer to an employee for work,*
- (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,*
- (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,*
- (d) money required to be paid in accordance with a determination or an order of the tribunal, and*
- (e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,*

but does not include

- (f) gratuities,*
- (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,*
- (h) allowances or expenses, and*
- (i) penalties;*

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

(2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

Clearly Roder performed services on behalf of Lyons, namely, the cleaning of vehicles assigned to her. As is noted above, “work” need not be undertaken at the employer’s place of business and thus the fact that Roder performed some mobile cleaning calls is immaterial. “Wages” were paid to Roder in the form of a “piecework formula” which was directly and exclusively related to the quantity of work performed by Roder. Lyons hired Roder and exercised a reasonable degree of control over the work performed by means of:

- assigning specific work to Roder;
- requiring Roder to fill out production recording sheets (“rough tracking sheets”) prepared by Lyons;
- Lyons set the piecework rates for the various job functions performed by Roder;
- Lyons reserved the right to let Roder go if she did not average minimum wage per piece (job);
- Lyons solicited the customers and received payment for the work performed.

There is nothing particularly unusual about this case. Roder was hired to clean cars for Lyons and performed the sort of work on behalf of Lyons that is often undertaken by employees of car service firms. The evidence before me was that Lyons provided the tools and equipment, the workplace, the customers and the only item provided by Roder was the labour.

What I have before me is a thinly disguised attempt by an employer to configure its relationship with its employees so that it appears as though they are independent contractors. By so doing, an employer may seek to avoid certain statutory obligations and other liabilities, such as the liability imposed on the employer in this case under the *Act*.

Based on the evidence provided I conclude that Roder was an employee of Lyons and is therefore entitled to minimum wage for all hours worked.

With respect to the issue of what wages are owed to Roder, in the absence of any records being kept by Lyons in regard to the hours Roder was at work, I conclude that the delegate of the Director was correct in accepting Roder’s hours as accurate. I further conclude that the calculation of wages owing and set forth in the Determination is correct.

Lyons provided no evidence nor did she offer any argument with regard to the zero dollar penalty imposed by a delegate of the Director. I must however, still review the appropriateness of the Penalty Determination.

Previous decisions of the Tribunal have found that the power of the delegate of the Director to impose a penalty must not be exercised in a way which is arbitrary and the reasons for imposing the penalty must be stated clearly in the Determination.

I am satisfied that the Determination clearly states the reasons for imposing the penalty.

I conclude therefore that the Penalty Determination was issued appropriately by the delegate of the Director.

For all of the above reasons, the appeal by Lyons is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated May 12, 1999 be confirmed in the amount of **\$1,221.15** together with whatever interest has accrued pursuant to Section 88 of the *Act* since the date of issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal