

An appeal

- by -

Bay City Auto Inc.
("Bay City")

- 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: Ib S. Petersen

FILE No.: 2001/242

DATE OF HEARING: June 22, 2001

DATE OF DECISION: July 12, 2001

DECISION

APPEARANCES:

Mr. Susan McEvoy

on behalf of Bay City

OVERVIEW

This is an appeal by Bay City pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on March 1, 2001 which determined that Owen Boyles was an employee of Bay City and that he was owed \$5,032.74 on account of overtime, vacation pay and compensation for length of service.

Bay City argues that the Determination is wrong because Boyles was, in fact, an independent contractor.

FACTS AND ANALYSIS

The appellant has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am persuaded that it has met that burden.

The basic background facts may be gleaned from the Determination. Bay City operates an automobile dealership in Port Coquitlam. Boyles performed accounting services for Bay City between February 23, 1999 and October 5, 2000. He was a Certified Management Accountant and billed Bay City \$4,000 every month plus GST.

A hearing was held on June 22, 2001, at the Tribunal’s offices. Bay City was represented at the hearing. Though duly notified, neither Boyles nor the delegate appeared or participated.

At the hearing, Bay City’s witnesses--Marco Abernante, Lena Abernante, Susan White and Susan McEvoy--provided evidence undermining the factual underpinnings of the Determination. Their testimony under oath included the following:

- Boyles was a Certified Management Accountant;
- He made it clear to Bay City that he had other clients and that he worked for those clients at the material time;
- There was a clear understanding at the time of the commencement of the relationship that Boyle was to be an independent contractor

- He billed Bay City \$4,000 monthly plus GST;
- He was paid through accounts payable, not payroll;
- He was not expected to be at the dealership more than three days a week, between 25 and 40 hours;
- He decided which days to work;
- He could perform (at least some) of the work for Bay City at his home office and often did so;
- Ms. McEvoy explained that in her experience, as a Chartered General Accountant in public practice, it is common to take contracts on a per diem rate or monthly retainer.

The application of the statutory definitions of “employee” and “employer” is not as easy or simple as one might have expected. As I noted in *Knight Piesold Ltd.*, BCEST #D093/99:

“Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and “integration” (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, [1947] 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of “whose business is it”.”

In my view the Determination must be set aside.

On my view of the statute, the common law tests and all of the evidence, I agree with Bay City’s submission that Boyles was an independent contractor. He was an accountant who was in the business of providing accounting services to various clients, one of whom was Bay City. As I have found as a fact that Boyle worked for other clients while he performed services for Bay City, *i.e.*, on different findings of fact, I am of the view that he did have opportunities for profit and risk of loss. The delegate concluded that Boyle was “dependent on [Bay City] for his income for his income and had no opportunity to render similar services to other companies ... as he was fully employed and did not have time to work elsewhere.” Bay City may have been his primary source of income. However, on the evidence he not only had the time to work for other clients, he, in fact, did so. In brief, overall on the evidence, I agree with Bay City.

I add, as well, that I have some difficulties with the delegate's application of the various common law tests. For example, while the delegate identified and sought to consider various tests, in light of the statutory definitions, he erred in law when he relied on a test referred to as an "ordinary man test"--*i.e.*, would an ordinary person view the relationship as an employer-employee relationship. In my opinion, there is no foundation in law for this test.

Moreover, his reasoning is, in some instances, partly based on presumptions without foundations in the evidence. One example may be found at page 5 of the Determination where the delegate--under the heading "chance of profit and risk of loss"--contrasts compensation for independent contractors with that of employees. The former "would normally be "paid at the completion of the prescribed work and by way of a fixed amount;" the latter, on the other hand, will generally receive a "salary, wage or commission based on a time period....An employee's earnings are not dependent on whether or not the employer makes a profit or not(sic.)." In my view, these considerations may well be factually incorrect as the testimony of McEvoy suggests.

In my opinion, the delegate's analysis and, thus, his conclusions contain both factual and legal errors, and the appeal is granted.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated March 1, 2001 be cancelled.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal