

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 -

City Wide Equipment Ltd.
("City Equipment")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 97/364

DATE OF HEARING: August 11, 1997

DATE OF DECISION: August 26, 1997

DECISION

OVERVIEW

The appeal is by City Wide Equipment Ltd. (“City Equipment”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) dated April 14, 1997. In the Determination it is found that City Equipment owes Sara Thornber wages.

APPEARANCES

Antonio Nisi

For City Wide Equipment

Theresa Robertson

For the Director

ISSUES TO BE DECIDED

At issue is the matter of whether or not Thornber was an employee of City Equipment. City Equipment says that it tested Thornber for a job but did not hire her.

Should it be found that Thornber was an employee, her rate of pay and the number of hours worked are both at issue. City Equipment says the secretarial job that it had to offer paid only \$7.00 per hour, not \$10.00 as set out in the Determination. City Equipment also says that Thornber worked nothing like a week, that she merely tested for a job, met Tony Nisi, owner of the company, and discussed other work one day that she might do, and came in to City Equipment’s office on a Saturday in order to meet its office manager.

FACTS

Sara Thornber learned of City Equipment’s need for a secretary through a Human Resources Centre of the Government of Canada. Tony Nisi interviewed her for the job in the evening of December 8, 1996. He was at that time readying City Equipment for business which was going to be undertaken early in 1997.

The complaint filed by Thornber is that she was hired and performed work for City Equipment but was not paid. On appeal Nisi presents me with a very different version of events. He says all he did was have Thornber prepare a letter on December 9th as a test of her secretarial abilities, that he found her to be “incompetent”, and that she was not hired as a result.

My determination of the facts is greatly complicated by Thornber's failure to attend the hearing set in the appeal, even though special arrangements were made for her to do so through teleconferencing, and Nisi himself. Nisi could not control his temper. His response to some matters was to fly into an unthinking rage.

On the basis of what Nisi was able to tell me, I find that at least the following occurred after the interview on the 8th:

- Thornber was at the office of City Equipment on December 9, 1996 and prepared a letter to an insurance company on Nisi's request. While she did that, Nisi was in and out of the office. Thornber completed the letter, Nisi signed the letter and mailed it to the insurance company.
- Nisi and Thornber met a day or two later, in the evening in a restaurant. Nisi bought food and beer. They discussed other work that she might do for City Equipment and for Nisi, house work and laundry included.
- Office furniture and equipment was moved from storage into City Equipment's office on Saturday, December 14, 1996. A woman that Nisi had decided to employ as office manager was in the office that day, directing where things should go. Thornber was at the office that day as well, for a good part of the day.

As Nisi presents matters, he met Thornber in the restaurant in order to tell her that she would not be getting the secretarial job. And according to Nisi, Thornber on being told that she did not have the job, asked if there was other work that she could do and that led to her to being in City Equipment's office on the Saturday, so that she could meet the new office manager. But I find it most unlikely that Nisi, on deciding that Thornber was incompetent, would meet her as he did, just to tell her that she was not being hired. That he did so leads me to conclude that he felt obligated to do so because he had already led her to think that she had a job with City Equipment. I also find it unlikely that Thornber would stay at City Equipment's office for as long as she did on the 14th, if all she was to do was to meet the new office manager. I find it more likely that she did so because she thought it expected of her as an employee.

In filing her complaint, Thornber said that she was hired at \$10.00 per hour. I am presented with evidence of a job posting for a part time secretarial position at City Wide Equipment at \$7.00 per hour. There is no other hard evidence to the contrary and so I conclude that Thornber's rate of pay was only \$7.00 per hour.

The Director's delegate had only the employee's records on which to rely and on that basis concluded that 40 hours of work were performed. I am presented with no hard evidence that any hours were worked beyond those to which I refer above.

ANALYSIS

The Director found that Thornber worked for City Equipment. As I find the facts, they are in support of that conclusion. Thornber was led to believe that she had a job. But beyond that it is also clear to me that Thornber performed work for City Equipment and performed work normally performed by an employee, in preparing the letter to the insurance company as she did. As such I find that she fits the *Act's* definition of employee. That definition is 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 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.*

The only hard evidence before me points to pay at \$7.00 an hour.

No evidence to the contrary, I find that Thornber performed several hours of work on the 9th, is entitled to 4 hours pay as a result of the restaurant meeting called by Nisi, and performed several more hours of work on the 14th. I find that she is owed two days' pay in total. At \$7.00 an hour, I calculate that Thornber is owed \$112 in wages. To that I add vacation pay at 4 percent, or \$4.48, and interest for a grand total of \$118.81.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated April 14, 1997 be varied. City Wide Equipment Ltd. owes Sara Thornber wages, vacation pay and interest totalling \$118.81.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc