Employment Standards TRIBUNAL

An appeal

\- by -

Ben Faber Construction Ltd.
(the "Appellant")

\- 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:	E. Casey McCabe
FILE No.:	2001/142
DATE OF HEARING:	June 14, 2001
DATE OF DECISION:	July 31, 2001

DECISION

APPEARANCES:

Ben Faber	for the employer
Ted Bleeker	for himself

OVERVIEW

This is an Appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Ben Faber Construction Ltd. from a determination dated January 21, 2001. That determination found that Mr. Ted Bleeker was an employee who was entitled to the payment of $2,579.60 for unpaid wages.

ISSUES TO BE DECIDED

1. Is Mr. Bleeker an employee or an independent contractor?
2. What is the period of potential wage recovery?
3. What number of hours were worked by Mr. Bleeker?
4. What was his rate of pay?
5. Are outstanding wages still owed?

FACTS

Ben Faber Constructions Ltd. ("the employer") is a small contracting firm doing renovations in the commercial market. The employer secured a contract for the renovation of a retail chain store in Vancouver during January and February, 2000. Mr. Ted Bleeker ("the complainant") worked on the project as a carpenter/drywaller and taper. The complainant worked from approximately mid January 2000 until his termination on February 21, 2001.

The source of the dispute between the two parties arises from the nature of the work to be completed and the rate of pay. Initially the employer had contracted with a Mr. Doug MacLeod to have the drywalling and taping at the renovation completed on a piece work basis. Mr. MacLeod recruited the complainant to work with him to complete the job. Prior to the commencement of the drywall portion of the job it became apparent that extra framing would be required to conform with the City of Vancouver Building Inspection Regulations. Part of the work that required extra framing was the fireproofing of beams in the building. There is no

question that this extra framing was outside of the scope of the work contracted by Mr. MacLeod. The situation became further complicated when Mr. MacLeod withdrew from the job leaving the complainant to complete the work.

The evidence is clear from that nature of the framing required additional payment for that work. The complainant and the employer negotiated an hourly rate of $20.00 per hour. The dispute arises because the employer claims that the $20.00 per hour rate was for the extra work involved in the framing and that the original piecework contract remained for the dry walling and taping. The complainant takes the position that the piecework contract was superseded or was replaced by the $20.00 per hour wage rate.

I agree with the complainant that the nature of the payment for the work performed was by the hour and that the negotiation of the $20.00 per hour rate superseded the piecework contract. I draw that conclusion from the facts that existed at the time. Mr. MacLeod with whom the original piecework rate was negotiated was no longer on the job. The job was under a time limit for completion. The framing work was different in nature from the dry walling/taping work that had originally been contracted with Mr. MacLeod. The complainant was not part of those original negotiations, but did negotiate a $20.00 per hour rate with the employer at the time that the requirement for the additional framing was apparent. The employer did pay the complainant in the period prior to February 2, 2001, on the basis of work performed at $20.00 per hour rather than the piecework rate. For these reasons I agree that the piece work contract was superseded by the $20.00 per hour rate.

The question that arises, notwithstanding that the employment contract was based on $20.00 per hour rather than a piece work rate, is whether the complainant was an employee or a contractor. The delegate applied the four fold test. He considered the factors of control, ownership of tools, risk of loss and chance of profit as determining factors. The delegate found that the employer had secured the contract with the chain store and that he both directed and checked the complainant's work on a daily basis. He found that the employer provided the necessary equipment and supplies for the complainant to do the work. When the employer became dissatisfied with the complaint's performance the employer terminated the complainant. The complainant had contributed only his labour and trade tools towards the completion of the project. He was required to report to the project daily. The complainant assumed no risk of loss or chance of profit which is significant in view of the extras that were required. It was clear from the evidence that risk associated with the extra work fell squarely on the employer. For these reasons the delegate determined that the complainant was employee. I agree with that finding.

The employer argued that the fact that the complainant put his GST number on his invoices is proof that the complainant was acting as an independent contractor rather than an employee. The complainant's answer to that assertion was that he would not have been paid any monies unless he put his GST number on the invoices. I accept that explanation. The fact that the invoices contained a GST number does not undermine the reasoning which leads to the conclusion that

the complainant was an employee for the purposes of the *Employment Standards Act* rather than an independent contractor.

The next issue requires a determination of potential wage recovery. The employer and the complainant agree that the period of potential wage recovery began on February 2, 2000. The complainant has claimed hours worked through Sunday, February 20. The employer candidly acknowledged that although he was on the job almost daily that he did not check to see if the griever was present on Sunday, February 20. The griever's records indicate that he was present. Therefore, I resolve this issue in favour of the complainant and find that the period of potential wage recovery is February 2 to February 20, 2001.

I also accept that the complainant's rate of pay was $20.00 per hour for hours worked.

The final question to be determined is what hours were worked by the complainant and whether outstanding wages are owing. I will deal with those two issues concurrently.

It is not uncommon that disputes over hours worked arise out of the record keeping, or lack thereof, by the employer. In this case the employer did not keep records that were required under Section 28 of the *Act*. The employer relied on its assumption that the nature of the employment relationship was one of an independent contractor rather than an employee. On the other hand the complainant did keep a private calendar and did invoice on an hourly basis. The employer has been found in breach of Section 28 of the *Act*. The corollary to this breach is that the best evidence available to the delegate and at this hearing were the records kept by the complainant and the testimony of the employer and the complainant. I turn to that evidence particularly the testimony of the parties.

Mr. Faber testified that he disputed the hours submitted by the complainant for the period of February 2 through Friday, February 9. However, no basis was given for disputing those hours other than the fact that Mr. Faber would leave the job by 5:00 p.m. each evening. When he left the job the complainant was still working. Mr. Faber challenged the additional hours, which ranged from 30 minutes to 2 hours and 30 minutes per day depending on the day. I am not prepared to disturb the findings that the complainant worked the hours that the delegate determined were worked from the period of Wednesday, February 2, through Saturday, February 12. That portion of the determination remains undisturbed.

However, Mr. Faber testified that the complainant did not work on Sunday, February 13, Monday, February 14, and Tuesday, February 15. He further testified that on Wednesday the 16th the complainant did not arrive until 10:00 a.m. and therefore worked only 8 hours. He asserts that the same number of hours were worked on Thursday the 17th. He did not challenge the 7 hours claimed by the complainant for Friday, February 18, but did state that he believed that the complainant worked only 4 hours on Saturday, the 19th and, as stated previously, he did not attend the work place on Sunday, February 20, which was the complainant's last day of work. Mr. Faber further questioned the amount of work completed over the week in considering the nature of the job and the volume of material supplied by him to complete the work.

The complainant testified that he did work each day; however, I find his answers to the challenge of the hours worked and volume of production equivocal.

In assessing the credibility of witnesses an adjudicator must assess the totality of the evidence taking into account the nature and circumstances and the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. See Faryna v. Chorny [1952] 2 D.L.R. 354.

In these circumstances I accept that the employer was under pressure to complete the job. It is more likely that the complainant did work Sunday, February 13, Monday, February 14, and Tuesday, February 15, with the pressure that the employer was under to complete the job by the following week. I also note that the employer did not raise a question of the complainant not working February 13, 14 and 15 until the hearing. I saw nothing in the file material to indicate this was an issue. However, I do accept that the complainant did not work the hours claimed. I therefore vary the order to reflect 8 hours work per day for the period of Sunday, February 13; Monday February 14; Tuesday, February 15; Wednesday, February 16; and, Thursday, February 17. I further find that the complainant did work the 7 hours he claimed on Friday, February 18, and the 7 hours claimed on Saturday, February 19. Mr. Faber did not attend the work site on Sunday, February 20, 2000. The employer could offer no cogent evidence to dispute the claim for that day. Therefore the claim for 10.5 hours for Sunday, February 20, 2000, is upheld.

ORDER

The Determination dated January 24, 2001, is varied to reflect the hours worked from Sunday, February 13 through Thursday February 17, 2000. The complainant is entitled to interest on the amounts owing to date.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal